In the Supreme Court

OF THE

UNITED STATES,

OCTOBER TERM, 1902.

Davis & Farnum Manufacturing Company, a corporation,
Appellant,

vs.

City of Los Angeles, a municipal corporation,
Appellee.

BRIEF AND ARGUMENT ON BEHALF OF APPELLEE.

May it Please Your Honors:

This was a bill in equity, filed in the Circuit Court of the United States for the Southern District of California, Ninth Circuit, on the 6th day of March, 1902, by the Davis & Farnum Manufacturing Company, a citizen of the State of Massachusetts, against the City of Los Angeles, a municipal corporation of the State of California, praying for an injunction to restrain the City of Los Angeles and its officers from enforcing certain ordinances of the said City of Los Angeles, prohibiting the erection or maintenance of gas tanks or reservoirs within certain portions of the City of Los Angeles.

Statement of the Case.

The bill in equity, as amended, alleged substantially as follows:

That on the 28th day of December, 1899, the City of Los Angeles adopted an ordinance declaring that "it shall be unlawful for any person, firm or corporation to erect or cause to be erected, or maintain, any livery stable * * * soap factory * * * or gas works, without a permit from the Fire Commissioners so to do," which ordinance designated certain steps to be taken and things to be done by the petitioner for said permit and by the clerk of said Board of Fire Commissioners before said permit could be granted by said board.

That plaintiff Davis & Farnum Manufacturing Company was a corporation, duly organized under the laws of the State of Massachusetts; that the City of Los Angeles is a municipal corporation, duly organized under the laws of the State of California;

That on the 26th day of August, 1901, the City of Los Angeles adopted the following ordinance:

ORDINANCE No. 6663.

(New Series.)

An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles.

THE MAYOR AND COUNCIL of the city of Los Angeles do ordain as follows:

Section 1. It shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment or manufactory for the manufacture of gas, or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the city of Los An-

geles, outside of the limits of the district described as follows, to-wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles river with the south charter boundary line of the city of Los Angeles; thence westerly along said south charter boundary line to the center line of Santa Fe avenue; thence northerly along the center line of Santa Fe avenue to the center line of Violet street; thence westerly along the center line of Violet street to the center line of Wilson street; thence northerly along the center line of Wilson street to the center line of Atlantic street; thence westerly along the center line of Atlantic street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street to the prolonged center line of Santa Fe Avenue; thence northerly along said prolonged center line of Santa Fe avenue to the center line of First street; thence easterly along the center line of First street to the center line of Center street; thence northerly along the center line of Center street to the center line of Aliso street; thence westerly along the center line of Aliso street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of San Fernando street; thence easterly along the center line of San Fernando street to the center line of the official bed of the Los Angeles river; thence southerly along the official bed of the Los Angeles river to the point of beginning.

Section 2. Any person, firm or corporation who shall violate any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) or by imprisonment in the city jail for not less than thirty (30) days nor more than one hundred (100) days, or by both such

fine and imprisonment. Every day that such gas works, tank or reservior is maintained in violation of the provisions of this ordinance, shall be deemed a separate offense within the meaning of this ordinance.

Section 3. Ordinance No. 174, approved July 2nd, 1885, and all other ordinances or parts of ordinances in conflict herewith are hereby repealed.

Section 4. The city clerk shall certify to the passage of this ordinance and cause the same to be published once in The Los Angeles Daily Journal and thereupon and thereafter it shall take effect and be in force.

I hereby certify that the foregoing ordinance was adopted by the council of the city of Los Angeles at its meeting of August 26th, 1901.

C. H. HANCE, *City Clerk.*

Approved this 26th day of August, 1901.

M. P. SNYDER, *Mayor.*

That on or about the first day of September, 1901, one Caroline W. Dobbins, a citizen and resident of Los Angeles, California, made a contract with the Valley Gas and Fuel Company, a corporation, organized under the laws of the State of California, employing said Valley Gas and Fuel Company to build and erect for her certain gas works, including all things necessary for the manufacture, recovery and storage of gas, the said gas works to be built and erected in Los Angeles city, on premises thereafter to be designated by said Caroline W. Dobbins;

That on the 17th day of September, 1901, at Waltham, Massachusetts, the Davis & Farnum Manufacturing Company made a contract with the Valley Gas and Fuel Company to build and erect in the City of Los Angeles, on premises thereafter to be designated by Caroline W. Dobbins, certain portions of said gas works, to wit, a water tank *and a gas holder*

having a capacity of 100,000 *cubic feet of gas,* for which work the Valley Gas and Fuel Company were to pay the Davis & Farnum Manufacturing Company $13,685, upon the delivery of said works complete;

That immediately thereafter the Davis & Farnum Manufacturing Company constructed and prepared the material necessary for the erection of said work, and shipped the same to Los Angeles, California;

That on the 28th day of September, 1901, Caroline W. Dobbins, for the purpose of erecting her said gas works, purchased certain property situated in Los Angeles city, and known as Lots 16, 17 and 18, in Block 2 of Pomeroy & Mills' Subdivision of the Hollenbeck Tract; that said lots were within the limits where it was lawful to erect gas works as described in Ordinance No. 6663 (New Series), adopted August 26th, 1901; that on the 1st of November, 1901, Mrs. Dobbins applied to the Board of Fire Commissioners for a permit to erect gas works on said lots 16, 17 and 18, in Block 2 of Hollenbeck Tract, and that she complied with all the provisions of the ordinance of December 28th, 1899;

That on the 22nd day of November, 1901, said petition for a permit came on regularly for hearing before the Board of Fire Commissioners of said city, consisting of five members—Messrs. Webb, Vickery, Frankenfield, Kuhrts and Mayor Snyder; that after proof had been made that all the provisions of the ordinance of December 28, 1899, had been complied with, it was moved that the permit be granted, and Messrs. Webb, Vickery and Frankenfield voted aye, and Commis-

sioner Kuhrts voted no; that thereupon, and after said vote was announced, Commissioner Kuhrts changed his vote from no to aye, and gave notice that on the next meeting of the board, to wit, on the 29th of November, 1901, he would move to reconsider the motion; and thereafter, on the 29th of November, 1901, at the regular meeting of said Board of Fire Commissioners, Commissioner Kuhrts moved to reconsider the motion of the last meeting; that on said motion to reconsider Messrs. Webb, Vickery and Frankenfield voted no, and Commissioner Kuhrts and Mayor Snyder voted aye;

That on 22nd day of November, 1901, and immediately after the vote of the Board of Fire Commissioners, Mrs. Dobbins made contracts with various persons for the erection of various portions of the aforesaid gas works on Lots 16, 17 and 18, of Block 2 of Pomeroy & Mills' Subdivision aforesaid;

That upon said 22nd of November, 1901, said persons began to lay the foundation for said works, which were of great strength, and cost upwards of $2500.00, and that if said foundations should have to be destroyed or removed, it would cause irreparable damage and injury to Mrs. Dobbins, the Valley Gas and Fuel Company and to the Davis & Farnum Manufacturing Company;

That on November 25 the City of Los Angeles adopted an ordinance in words and figures as follows:

ORDINANCE No. 6779.
(New Series.)

An Ordinance amending Ordinance No. 6663, New Series, entitled "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles," approved August 26, 1901, by amending Section 1 of said Ordinance.

THE MAYOR AND COUNCIL of the City of Los Angeles do ordain as follows:

Section 1. That Section 1 of Ordinance No. 6663, New Series, entitled "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks, or reservoirs within certain portions of the City of Los Angeles," approved August 26th, 1901, be and the same is hereby amended to read as follows:

Section 1. It shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained any works, establishment or manufactory for the manufacture of gas, or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the City of Los Angeles, outside of the limits of the district described as follows, to wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles river with the south charter boundary line of the City of Los Angeles; thence westerly along said south charter boundary line to the center line of Santa Fe avenue; thence northerly along the center line of Santa Fe avenue to the center line of Violet street; thence westerly along the center line of Violet street to the center line of Wilson street; thence northerly along the center line of Wilson street to the center line of Atlantic street; thence westerly along the center line of Atlantic street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street

to the prolonged center line of Santa Fe avenue; thence northerly along said prolonged center line of Santa Fe avenue to the center line of First street; thence easterly along the center line of First street to the center line of Center street; thence northerly along the center line of Center street to the center line of Aliso street; thence westerly along the center line of Aliso street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of San Fernando street; thence southeasterly following the line of the Southern Pacific Railway on Redondo street and Alhambra avenue to the official bed of the Los Angeles river; thence southerly along the official bed of the Los Angeles river to the point of beginning.

Section 2. The City Clerk shall certify to the passage of this Ordinance and shall cause the same to be published once in The Los Angeles Daily Journal, and thereupon and thereafter it shall take effect and be in force.

That since the 22nd of November, 1901, and until the 25th day of February, 1902, Caroline W. Dobbins, the Valley Gas and Fuel Company and the Davis & Farnum Manufacturing Company were peaceably engaged in the erection of gas works on said Lots 16, 17 and 18, Block 2 of Pomeroy & Mills' Subdivision aforesaid;

That on the 25th of February, 1902, the City of Los Angeles, combining and confederating with one James R. C. Burton and various persons, caused certain of the employees of the Valley Gas and Fuel Company, who were at work in erecting said gas works, to be arrested on a complaint charging them with a violation of Ordinance No. 6779 aforesaid;

That on the 1st day of March, 1902, the City of Los Angeles, again combining and confederating with

one James R. C. Burton and various other persons, instituted a criminal proceeding against certain employees of the Valley Gas & Fuel Company, and caused them to be arrested upon a complaint charging them with violating the provisions of Ordinance No. 6779 (New Series) of the City of Los Angeles;

That again, on March 1st, 1902, the City of Los Angeles, combining and confederating with said James R. C. Burton and various other persons, instituted another criminal proceeding in the police court of Los Angeles city against certain employees of the Valley Gas and Fuel Company and certain employees also of the Davis & Farnum Manufacturing Company, and caused them to be arrested upon a criminal complaint, charging them with a violation of Ordinance No. 6779 (New Series) of the City of Los Angeles;

That, on the 3rd of March, 1902, the City of Los Angeles adopted Ordinance No. 7029 (New Series) of which the following is a copy:

ORDINANCE No. 7029.
(New Series.)

An Ordinance amending Ordinance No. 6663, New Series, entitled, "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles," approved August 26, 1901, by amending section 1 of said Ordinance.

THE MAYOR AND COUNCIL of the city of Los Angeles do ordain as follows:

Section 1. That section 1 of Ordinance No. 6663, New Series, entitled, "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles," approved August 26, 1901, be and the same is hereby amended to read as follows:

Section 1. It shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment or manufactory for the manufacture of gas; or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the city of Los Angeles, outside of the limits of the district described as follows, to-wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles river with the south charter boundary line of the city of Los Angeles; thence westerly along said south charter boundary line to the center line of Santa Fe avenue; thence northerly along the center line of Santa Fe avenue to the center line of Violet street; thence westerly along the center line of Violet street to the center line of Wilson street; thence northerly along the center line of Wilson street to the center line of Atlantic street; thence westerly along the center line of Atlantic street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street to the prolongation southerly of the center line of Santa Fe avenue; thence northerly along said prolonged center line of Santa Fe avenue and along the center line of Santa Fe avenue to the center line of First street; thence easterly along the center line of First street to the center line of Center street; thence northerly along the center line of Center street to the center line of Aliso street; thence westerly along the center line of Aliso street to the center line of Alameda street; thence northerly along the center line of Alameda street to Main street; thence along Main street to the intersection of Main and San Fernando streets; thence northeasterly along the center line of San Fernando street to the center line of Redondo street; thence southeasterly, following the line of the Southern Pacific railway on Redondo street and Alhambra avenue to the official bed of the Los

Angeles river; thence southerly along the official bed of the Los Angeles river to the point of beginning.

The avenue designated herein as Santa Fe avenue, is the avenue lying in the district bounded by the Los Angeles river on the east and Alameda street on the west, and extending in a northerly and southerly direction between these two lines.

Section 2. The city clerk shall certify to the passage of this ordinance and shall cause the same to be published once in the Los Angeles Daily Journal, and thereupon and thereafter it shall take effect and be in force.

I hereby certify that the foregoing ordinance was adopted by the council of the city of Los Angeles at its meeting of March 3rd, 1902.

C. H. HANCE, *City Clerk.*

Approved this 3rd day of March, 1902.

M. P. SNYDER, *Mayor.*

That since the adoption of said Ordinance No. 7029 (New Series) the city, again conspiring with James R. C. Burton and various other persons, has instituted another criminal proceeding in the said police court against certain employees of the Valley Gas and Fuel Company and of the Davis & Farnum Manufacturing Company, and caused them to be arrested upon a criminal complaint charging them with a violation of said Ordinance No. 7029 (New Series);

That the City of Los Angeles threatens that if the Davis & Farnum Manufacturing Company continues to carry on the work of erecting gas works on said lots 16, 17 and 18 in block 2 of Pomeroy & Mills Subdivision aforesaid that it will arrest all persons employed by said Davis & Farnum Manufacturing Company and engaged upon said gas works until it will stop the business of said Davis & Farnum Manufactur-

ing Company in erecting said gas works, and prevent it from carrying out its contract made with the Valley Gas and Fuel Company, at Waltham, Massachusetts, as aforesaid;

Appellant's bill in equity still further alleges that the gas works are in an incomplete condition and exposed to the elements and are in danger of being destroyed by the elements and that the Davis & Farnum Manufacturing Company have expended upwards of $8000 upon said works;

That the said Davis & Farnum Company have brought skilled laborers and mechanics from the East to erect said works and that they cannot secure like men again;

The bill further alleges that in the neighborhood where said gas works are being erected there is a wool-pulling factory, a soap factory and various other institutions of a like nature;

That the City of Los Angeles vexed, annoyed and harrassed Caroline W. Dobbins by compelling her to get a permit from the Street Superintendent of said city and compelling her to make oath that the gas she intended to supply to the City of Los Angeles was for illuminating purposes only, before she should be permitted to use the streets for the laying of pipes, etc.;

That the City of Los Angeles, its agents, officers and common council were in all their acts and doing aforesaid unlawfully instigated, advised and controlled by the officers, agents and attorneys of the Los Angeles Lighting Company, a California corporation engaged

in supplying gas to the citizens of Los Angeles City, and that said Los Angeles Lighting Company has enjoyed a monopoly of the gas business in the said city for the last ten years;

That all the aforesaid ordinances were adopted by the common council of Los Angeles City at the instigation of said Los Angeles Lighting Company; that said gas works are being built of the best material and in the most approved manner and so that they will not become a nuisance; that the aforesaid acts of the City of Los Angeles has caused the Davis & Farnum great and irreparable damage, loss and injury;

That ordinances Nos. 6779 and 7029, are void and invalid;

First—Because they are uncertain and unreasonable.

Second—Because they impair vested rights acquired by Mrs. Dobbins and the Davis & Farnum Manufacturing Company prior to the adoption of said ordinances, and are in violation of the provisions of the Constitution of the United States prohibiting the passing of any law impairing the obligation of contracts

Third—Because they are in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States in that they abridge the privileges and immunities of citizens of the United States, and are intended to deprive the plaintiff of its property without due process of law and to foster a monopoly, and to deny to all persons within the jurisdiction of the City of Los Angeles the equal protection of the laws.

The prayer is for a temporary injunction restrain-

ing the City of Los Angeles from enforcing the ordinances complained of, and that upon the final hearing the city may be perpetually enjoined from enforcing said ordinances.

Defendants demurred to the bill on the grounds, among others, that it appeared from the bill that the complainant was not entitled to the relief prayed for or to any relief, and that the Circuit Court had no jurisdiction of the subject matter of the bill, or of the person of the defendant.

On the hearing by the Circuit Court, the demurrer to the bill was sustained, the motion for a temporary injunction was denied and the bill was dismissed.

From the said order and decree this appeal has been taken.

BRIEF.

I.

A court of equity has no power to interfere with the enforcement of criminal laws.

Ex parte Sawyer, 124 *U. S.* 200-225.
Suess v. Noble, 31 *Fed. Rep.* 855.
Hemsley v. Myers, 45 *Fed. Rep.* 286.
Fitts v. McGhee, 172 *U. S.* 528.
Minneapolis Brewing Co. v. McGillivray, 104 *Fed. Rep.* 259.

II.

A bill in equity will not lie to restrain prosecutions under a municipal ordinance upon the mere ground of its alleged invalidity.

City of Denver v. Beede, 54 *Pac. Rep.* 624.

Wardens of St. Peter's Episcopal Church v. Town of Washington, 13 *S. E. Rep.* 700.

State v. Wood, 56 *S. W. Rep.* 477.

Crighto v. Dahmer, 21 *L. R. A.* 84.

Wolfe v. Burke, 56 *N. Y.* 115.

Wallack v. Society, 67 *N. Y.* 28.

West v. Mayor, 10 *Paige* 539.

City of Bainbridge v. Reynolds, 111 *Ga.* 758

Mayor v. Patterson (*Ga.* 1900) 34 *S. E.* 600.

III.

The cases relied upon by appellant are not in point, or have been overruled.

Stone v. Mississippi, 101 *U. S.* 814.

Fitts v. McGhee, 172 *U. S.* 528.

Hemsley v. Myers, 45 *Fed.* 283

Davis & Farnum Mfg. Co. v. City of Los Angeles, 115 *Fed. Rep.* 537, and cases therein cited.

IV.

The enactment of ordinance No. 7029 (New Series) is fully within the police powers delegated to the City of Los Angeles by the state.

Constitution of California, Art XI, Sec. 11.

Charter of Los Angeles, Art. I, Sec. 2; Art. III, Sec. 27-40, *Stats.* 1889, *p.* 458.

Dillon Municipal Corporations, 4th Ed., Vol. 1, *Secs.* 141 *and* 400.

Butchers' Union, etc., v. Crescent City, 111 U. S. 746.

Slaughter House Cases, 16 *Wall.* 62.

V.

The City of Los Angeles, under its police power, was authorized to enact and enforce ordinance No. 7029, irrespective of the question as to whether or not gas works are a nuisance *per se*.

Ex parte Schrader, 33 *Cal.* 283.

Ex parte Lacy, 108 *Cal.* 326.

Ex parte Heilbron, 65 *Cal.* 609.

Canfield v. U. S., 167 *U. S.* 518.

Crowley v. Christensen, 137 *U. S.* 87.

Barbier v. Connolly, 113 *U. S.* 27.

Hing v. Crowley, 113 *U. S.* 703.

Cleveland v. Gaslight, etc., 20 *N. J.* 201.

Dillon Mun. Corp., 4th *Ed.*, *Vol.* 1, *p.* 216, 472.

Ex parte Byrd, 4 *Am. St. Rep.* 328.

Welch v. Hotchkiss, 12 *Am. Rep.* 385.

Cronin v. People, 37 *Am. Rep.* 564.

Milne v. Davidson, 16 *Am. Dec.* 189.

Milwaukee v. Gross, 91 *Am. Dec.* 472.

Tiedeman Police Powers, *Vol.* 2, *p.* 740.

VI.

The court in determining the validity of this ordinance can take into consideration only the face of the

ordinance and such facts as the court takes judicial cognizance of.

Powell v. Commonwealth of Pa., 127 *U. S.* 678, and cases therein cited.

VII.

A municipality can not give, grant, barter away or part with its right to exercise the police power delegated to it by the state.

Cooley Cons. Lim., 6 *Ed.*, *p.* 341.

Russell Police Powers, *p.* 88.

Davenport v. City of Richmond, 81 *Va.* 636.

Newton v. City of Galveston, 13 *S. W. Rep.* 368.

Butchers' Union v. Crescent City, 111 *U. S.* 746.

Northwestern Fertilizing Co. v. Hyde Park, 97 *U. S.* 659.

VIII.

All interests in property and rights in contracts, whether vested or not, are acquired and held by individuals and corporations subject to the right of the state and municipality to exercise their "police power" for the protection of the lives, health, safety and comfort of their citizens.

2 *Story Cons.*, *Sec.* 1954.

Cooley Cons. Lim., *6th Ed.* 707.

Mugler v. Kansas, 123 *U. S.* 669.

Com v. Alger, 7 *Cush.* 96.

Corporation of Knoxville v. Bird, 12 *B. J. Lea.* 121.

City of Salem v. Maynes, 123 *Mass.* 372.

City of New Orleans v. Stafford, 21 *Am. Rep.* 563.

Barbier v. Connolly, 113 *U. S.* 27.

Cleveland v. Citizens' Gas Light Co., 20 *N. J. Eq.* 206.

IX.

The allegations in appellants' bill, as to the unreasonableness of this ordinance, are not sufficient to justify this court in declaring the ordinance void on the ground that it is unreasonable.

Barbier v. Connolly, 113 *U. S.* 27.

Hing v. Crowley, 113 *U. S.* 703.

Slack v. Jacob, 8 *W. Va.* 612.

Waltman v. Philadelphia, 33 *Pa. St.* 212.

Munn v. Illinois, 94 *U. S.* 113.

Darnelly v. Cabanns, 52 *Ga.* 212.

Wells v. Mayor, 43 *Ga.* 67.

State v. Schlenker, 51 *L. R. A.* 351.

People v. Cipperly, 4 *N. E.* 108.

In re Wilshire, 103 *Fed. Rep.* 620.

City of Newton v. Joyce, 166 *Mass.* 83.

Harmon v. City of Lewiston, 46 *Am. St. Rep.* 893.

Cooley Cons. Lim., 5*th Ed.* 222.

ARGUMENT.

The first question that presents itself to us upon the argument of this case is:

HAS A COURT OF EQUITY THE POWER, UNDER THE FACTS SET OUT IN THE BILL, TO RESTRAIN AND ENJOIN THE CITY OF LOS ANGELES FROM ENFORCING ORDINANCE NO. 7029?

Counsel for appellant admit that as a general proposition of law a court of equity has no power to enjoin the enforcement of criminal laws, but they lay much stress upon the principle, enunciated in the case of Central Trust Company v. Citizens St. R. Co., 80 Fed. 225, that

"A court of equity has power to restrain by injunction a municipality from instituting criminal proceedings when such prosecutions are threatened under color of an invalid ordinance for the purpose of compelling the relinquishment of a property right."

Our contention is that the Circuit Court, sitting as a court of equity, had no power under the allegations set out in the bill to enjoin the City of Los Angeles from arresting and prosecuting the employes of the Davis & Farnum Company for violating the ordinance in question.

Before presenting the authorities in support of our contention, it will be well to inquire and ascertain from the bill just what the property rights of appellant are which it claims the City of Los Angeles *"is seeking to compel it to relinquish by threats of prosecution under*

an invalid ordinance." We have examined the bill carefully and the only ***property right*** of appellant that we can find asserted in the whole bill is its property in a certain contract alleged to have been made at Waltham, Massachusetts, on the 17th day of September, 1901, whereby appellant was employed by the Valley Gas and Fuel Company to erect certain portions of a gas works in the City of Los Angeles on premises thereafter to be designated by one Caroline W. Dobbins.

The right to carry out this contract and collect the price agreed to be paid to it under said contract upon completion of said work is absolutely the only property right and interest of appellant that is involved in this controversy.

We maintain that this contract was entered into by the appellants with the full knowledge that the City of Los Angeles had the right under its *police powers* to regulate the erection of gas works within its territory, and to prescribe limits wherein said works could be erected and to prohibit their erection outside of said prescribed limits, and under its *police powers* to change and alter said limits whenever it chose so to do. We contend that the right of either party to carry out this contract was subject to the exercise of the *police powers* of the municipality. The rights of both parties were subordinate to the rights of the City of Los Angeles to provide for and protect the health, safety and comfort of its citizens.

Under its contract the Davis & Farnum Manufacturing Company could not be compelled by the Valley Gas

and Fuel Company to erect gas works in any portion of the city where by ordinance it was unlawful to erect such works.

The Valley Gas and Fuel Company when it directed the appellant to erect the gas works on the premises set out in the bill did so with the full knowledge that the city had the right at any time under its *police powers* to prohibit the erection of such works on said premises and stop the erection of said works at any period of their construction.

In order to make this contention clear, let us put a suppositious case:

Suppose that the City of Washington had no police regulation with reference to the erection of slaughter houses or powder magazines, and that A contracts with B to build for the latter a powder magazine or slaughter house in the most thickly settled portion of said city. Would anyone contend that A did not enter into the contract with full knowledge that the city had a right at any time to prohibit the erection of such buildings in such districts, or that the city could not stop the erection of said buildings at any stage of their construction? Or can it be reasonably contended that A would suffer irreparable damage or injury if after he had begun the erection of said slaughter house or powder magazine the city should adopt an ordinance prohibiting the erection of such building in such thickly inhabited portions of the city? Or does any lawyer doubt that A would be able to recover from B for such work as he did in erecting such buildings prior to the time of the enactment of the prohibitory ordi-

nance? So we claim that in this case appellant has not suffered and will not suffer any irreparable damage or injury by reason of the enactment and threatened enforcement of ordinance No. 7029 (New Series) of Los Angeles City. It is clear that appellant can recover for work done upon said gas works prior to the enactment of said ordinance and that it can insist upon its right under its contract to erect said works in the City of Los Angeles upon premises to be designated by Mrs. Dobbins or the Valley Gas and Fuel Company, where it is lawful to erect the same. Under the allegations of the bill we can see no irreparable injury, nor, indeed, any injury that appellant will or can suffer by the enforcement of this ordinance. It would seem a monstrous proposition to say that A by contracting with B today to build ten years hence a slaughter house for B at a certain point in this city could when the ten years had elapsed enjoin the city from passing and enforcing an ordinance forbidding the erection of slaughter houses in said district, on the ground that the enforcing of such ordinance would destroy a property right of A under his contract with B. And yet when narrowed down, that is precisely the contention of appellant in this case. If such were the law, two men, one contracting to build at a future time wooden houses in certain portions of the city, at such places as should be designated by the other, might indefinitely prevent the city from establishing fire limits including such points. We cannot believe that such is the law of the land.

A COURT OF EQUITY HAS NO POWER TO INTERFERE WITH THE ENFORCEMENT OF CRIMINAL LAWS.

In support of this proposition we beg to cite the following authorities. In the hope of facilitating the examination of the authorities cited by us, we have quoted very freely from them, and have taken the liberty of italicising those portions which elucidate the points upon which we specially rely.

"Under the Constitution and laws of the United "States, the distinction between common law and "equity, as existing in England at the time of the "separation of the two countries, has been maintained, "although both jurisdictions are vested in the same "courts. (*Fenn v. Holme*, 62 *U. S.* 21 *How.* 481, "484-487 (16:198-200); *Thompson v. Central Ohio "R. R. Co.* 73 *U. S.* 6 *Wall.* 134 (18:765); *Heine v. "Levee Comrs.*, 86 *U. S.* 19 *Wall.* 655 (22:223).)

"The office and jurisdiction of a court of equity, un-"less enlarged by express statute, are limited to the "protection of rights of property. *It has no jurisdic-"tion over the prosecution, the punishment or the par-"don of crimes or misdemeanors,* or over the appoint-"ment or removal of public officers. *To assume such "a jurisdiction, or to sustain a bill in equity to restrain "or relieve against proceedings for the punishment of "offenses,* or for the removal of public officers, *is to in-"vade the domain of the courts of common law,* or of "the executive and administrative department of the "government. . . . . .

"From long before the Declaration of Independence "it has been settled in England that a bill to stay crim-"inal proceedings is not within the jurisdiction of the "court of chancery, whether those proceedings are by "indictment or by summary process.

"Lord Chief Justice Holt, in declining upon a motion "in the Queen's Bench for an attachment against an "attorney for professional misconduct, to make it part "of the rule to show cause that he should not move for

"an injunction in chancery in the meantime, said: "'*Sure, chancery would not grant an injunction in a "criminal matter under examination in this court; and "if they did, this court would break it, and protect any "that would proceed in contempt of it.*' (*Holderstaffe "v. Saunders, Cas. temp. Holt.* 136; *S. C.* 6 *Mod.* 16.)

"Lord Chancellor Hardwicke, while exercising the "power of the court of chancery, incidental to the dis- "position of a case pending before it, of restraining a "plaintiff, who had by his bill submitted his rights to "its determination, from proceedings as to the same "matter before another tribunal, either by indictment "or by action, asserted in the strongest terms the want "of any power or jurisdiction to entertain a bill for an "injunction to stay criminal proceedings, saying: 'This "court has not originally, and strictly, any restraining "power over the criminal prosecutions;' and again: "'This court has no jurisdiction to grant an injunc- "tion to stay proceedings on a mandamus; nor to an "indictment; nor to an information; nor to a writ of "prohibition, that I know of.' * * * * * *

"The modern decisions in England, by eminent "equity judges, concur in holding that a court of chan- "cery has no power to restrain criminal proceedings, "unless they are instituted by a party to a suit already "pending before it, and to try the same right that is in "issue there." * * * * * *

"Mr. Justice Story, in his Commentaries on Equity "Jurisprudence, affirms the same doctrine. Story, Eq. "Jur. Sec. 893. *And in the American courts, so far "as we are informed, it has been strictly and uniformly "upheld, and has been applied alike whether the prose- "cutions or arrests sought to be restrained arose un- "der statutes of the state, or under municipal ordi- "nances.*" . . . . . .

Ex parte Sawyer, 124, U. S. Sup. Ct. Rep. 200-225.

We desire also to cite the case of Suess v. Noble *et al.*, 31 Fed. Rep. 855. The facts in that case, as stated by the court, were as follows:

"Lewis Suess now presents his petition to this "court against the above-named defendants and others, *"alleging that they are engaged in commencing and "carrying on many criminal prosecutions against him* "before certain justices of the peace 'for each separate "sale of beer at his brewery,' and that they propose 'to "place him on trial and find him guilty of selling in- "toxicating liquors, and to impose upon him heavy "fines for said alleged offenses,' etc. He also states, "in a supplemental petition, that he was indicted at "the January term of the District Court of said county "for the alleged crime of causing a nuisance by the "sale of beer at his brewery; that he was convicted of "said alleged offense, and that he has taken an appeal "to the Supreme Court of Iowa upon the federal ques- "tion as to the constitutionality of the prohibitory law, "etc. The prayer of his petition is that this court issue "an injunction restraining said defendants from the "prosecution of said criminal suits in violation of his "rights respecting the subject-matter of the action now "pending in this court until the final determination of "the same."

The court, in rendering its opinion, says:

"Thus the proceeding now before me is in the na- "ture of an application to restrain the defendants by "injunction from the prosecution of sundry criminal "proceedings against the plaintiff under the prohibitory "law. *It is alleged, and no doubt truly, that if the de- "fendants be permitted to vex and pursue the plaintiff "with numberless criminal prosecutions before justices "of the peace and other state tribunals, the plaintiff will "be compelled to abandon his business, and that his "brewery property will be rendered useless and value- "less.* We are thus brought face to face with the ques- "tion whether or not a court of equity has any power "to interfere, by injunction or otherwise, with the en- "forcement of the criminal laws of the state.

* * * * * * * * *

"That no such power exists,—that its exercise has "been denied in both England and this country for "centuries,—is beyond question. This will be placed

"beyond all doubt by the authorities cited below. Who-
"ever will for a moment consider the nature and
"grounds of equity jurisdiction will not fail to see in-
"superable objections to the exercise of any restrain-
"ing power whatever in equity over the course of crim-
"inal proceedings. *The fundamental doctrine of*
"equity jurisdiction is that it can proceed only where
"there is no plain, adequate and complete remedy in
"the courts of common law. This principle is coeval
"with the system of equity itself. It was always upon
"this ground that the courts of equity in England as-
"sumed jurisdiction in civil causes. The principle was
"enacted into positive law by the congress of the
"United States in the judiciary act of 1793, (1 St. at
"Large, 82). It is re-enacted in Rev. St. Sec. 723, in
"these words: *'Suits in equity shall not be sustained*
"in either of the courts of the United States in any
"case where a plain, adequate and complete remedy
"may be had at law.'

"Upon what grounds, then, do courts of equity as-
"sume jurisdiction in any case whatever? It is upon
"the ground that no adequate remedy at law exists, and
"that injustice would be done if the court of equity did
"not interfere to give a better remedy than the courts
"of the common law are, by their very constitution,
"competent to administer. It would therefore be pre-
"posterous for equity to assume jurisdiction, and es-
"pecially to interfere with actual proceedings at law,
"in cases where a court of equity is utterly incompe-
"tent to give any remedy whatever. For a court of
"equity to interfere by staying proceedings at law,
"where there is some remedy, however imperfect, and
"then stand paralyzed and utterly impotent to remedy
"the assumed evil and injustice, would be the very
"height of legal absurdity. * * * * * *

"Again, public offenses are prosecuted in England
"in the name of the king, and in the United States in
"the name of the state. It is manifest that neither the
"king nor the state could be made a defendant to a
"bill in equity. The restraining power of the court
"would be futile as against them; and it would avail
"nothing for the court to address its restraining pro-

"cess to public and private prosecutors, even if the "power to do so existed, since the state would readily "find other agents to represent it in the criminal pro- "ceedings. *Courts of equity, therefore, deal only with "civil and property rights. They have no jurisdiction "to give relief in criminal cases, and they will not, "therefore, interfere by injunction with the course of "criminal justice.* (*Kerr v. Corporation of Preston*, 6 "*Ch. Div.* 463; *Saull v. Browne*, 10 *Ch. App.* 64; "*Moses v. Mayor*, 52 *Ala.* 198; *Joseph v. Burk*, 46 *Ind.* "59; *Gault v. Wallis*, 53 *Ga.* 675.)

"In Holderstaffe v. Saunders, 6 Mod. 16, Lord Holt "is reported to have said: 'Surely chancery will not "grant an injunction in a criminal matter under ex- "amination in this court, and that if they did this court "would break it, and protect any that would proceed "in contempt of it.' Montague v. Dudman, 2 Ves. Sr. "398. See, particularly, what the great equity judge, "Lord Hardwicke, says in this case. See, upon this "subject, High, Inj. Sec. 68, where the cases are col- "lected and cited.

Suess v. Noble, 31 Fed. 855.

The case of Hemsley v. Myers, Welch *et al.*, 45 Fed. Rep. 283, was a case where Hemsley filed a bill in equity in Circuit Court, praying for an injunction restraining the Sheriff, District Judge and County Attorney of Riley county, Kansas, from arresting or prosecuting him for a violation of a penal statute of the state of Kansas. Hemsley alleged in his bill that the threatened arrests were for the purpose of vexing and harrassing him and to injure and destroy his business, and that if said threatened prosecutions were instituted against him they would injure and destroy his business and work him irreparable damage and injury; the bill further alleged that the said penal statute of Kansas was void and invalid because in conflict with

the Constitution of the United States. The allegations as to damage and destruction of property rights and the invalidity of the statute are very similar to the allegations with reference thereto in the bill on file in the case at bar.

The following is the decision of Judge Caldwell in the case of Hemsley *et al.* v. Myers, Welch *et al.*

"The bill is bad on three grounds.

"1. Viewed in the light of a bill for an injunction "to restrain the violation of a constitutional or com-"mon-law right, or the commission of a trespass, it "fails to state a case cognizable in equity. The com-"plainants own no property, and have no property "rights to be affected. The owners of the liquor and "the house in which it was sold are not parties to the "suit. *The gravamen of the bill, so far as relates to "the complainant Hemsley, is that the alleged illegal "acts of the defendants will have the effect to throw "him out of his employment as agent for a Missouri "firm for selling packages of beer and pint bottles of "whiskey at Manhattan, Kansas.* * * * * * *

"The bill alleges that the sales made by the "complainant Hemsley, as agent, in this business, be-"tween the 21st day of June and the 3rd day of July, "1890, amounted 'in the neighborhood of $300 * * " * at wholesale prices.' It is not stated in the bill "whether the plaintiff Hemsley was compensated for "his services as agent by commissions on his sales or "was paid a fixed sum as wages. *The allegation in "the bill that he will sustain 'irreparable damage' is "the statement of a legal conclusion. The court will "look back of that averment to the facts, and deter-"mine from them, for itself, whether the damage is "irreparable.* By the term 'irreparable injury' is meant "a grievous one, not adequately reparable by damages "at law. *A man who has a full and complete remedy "at law to recover the damages he suffers cannot be "heard to say that the damage is irreparable.* It is ob-"vious that Hemsley can be fully and completely com-

"pensated *for his loss of commission or wages by an "action at law for his damages;* and this is so, though "it be conceded that he cannot procure other employ- "ment equally remunerative and respectable at Man- "hattan, or the same or other employment elsewhere. "His inability to get other employment might enhance "the damages, but it does not make his case one of "equitable cognizance. There is no averment in the "bill that the defendants are insolvent, and, in the ab- "sence of such an averment, their ability to respond to "the plaintiff for all damages which he may sustain on "account of their alleged wrongful acts will be pre- "sumed.

"*Section 723, Rev. St. U. S., declares that 'suits in "equity shall not be sustained in either of the courts "of the United States in any case where a plain, ade- "quate and complete remedy may be had at law.'* "This section is merely declaratory of the pre-existing "rule on the subject. The rule is elementary that, if the "wrong complained of can be adequately compensated "by a pecuniary sum, the remedy is at law, and an in- "junction will not issue. (*Kerr Inj. 226.*) This rule "is applicable to the case made by the bill, and fatal to "it.

"In the case of Wagner v. Drake, 31 Fed. Rep. 849, "—a case very similar to the one at bar—the learned "judge of the southern district of Iowa refused to "grant an injunction in favor of the proprietor of a "saloon to restrain the officers of the law, in Iowa, "from instituting and prosecuting proceedings under "the prohibitory law of that state, which it was al- "leged would destroy the plaintiff's business. Judge "Love said:

"'*The chief loss* of the saloon owner, if his business "is closed by the action of the state court, *is the value "of the fixtures and the furniture used in his trade. "These may be fully compensated in damages in ac- "tions at law.'*

"*Moreover the plaintiffs can appeal from the orders "and judgment of the District Court to the Supreme "Court of the state, and, if that court denies them any "right or privilege claimed under the Constitution or*

"laws of the United States, they may appeal to the "Supreme Court of the United States. These are all "the rights that parties to a suit in any court can de- "mand, and, in contemplation of law, they afford to "every suitor, in connection with the remedy the law "gives for illegal and unwarranted prosecutions, suf- "ficient legal redress. (High Inj., Secs. 28-30.)

"The bill seeks to enjoin criminal proceedings. A "court of equity possesses no such power. This prin- "ciple is settled by the uniform current of authorities "in England for two centuries, and in this country "from the foundation of its jurisprudence. The re- "cent emphatic reaffirmations of the doctrine by the "Supreme Court of the United States renders it un- "necessary to do more than repeat the rule in the lan- "guage of that court. The court said:

" 'The office and jurisdiction of a court of equity, "unless enlarged by express statute, are limited to the "protection of rights of property. It has no jurisdic- "tion over the prosecution, the punishment, or the par- "don of crimes or misdemeanors, or over the appoint- "ment and removal of public officers. To assume such "a jurisdiction, or to sustain a bill in equity to restrain "or relieve against proceedings for the punishment of "offenses, or for the removal of public officers, is to in- "vade the domain of the courts of common law, or of "the executive and administrative department of the "government. * * * * Mr. Justice Story, in his "Commentaries on Equity Jurisprudence, affirms the "same doctrine (Section 893). And in the American "courts, so far as we are informed, it has been strictly "and uniformly upheld, and has been applied alike, "whether the prosecutions or arrests sought to be re- "strained arose under statutes of the state or under mu- "nicipal ordinances. (*West v. Mayor, etc.*, 10 *Paige* "539; *Davis v. Society*, 75 *N. Y.* 362; *Tyler v. Ham- "mersley*, 44 *Conn.* 419, 422; *Stuart v. Supervisors*, 83 "*Ill.* 341; *Devron v. First Municipality*, 4 *La. Ann.* 11; "*Levy v. Shreveport*, 27 *La. Ann.* 620; *Moses v. "Mayor, etc.*, 52 *Ala.* 198; *Gault v. Wallis*, 53 *Ga.* 675; "*Phillips v. Mayor, etc.*, 61 *Ga.* 386; *Cohen v. Com- "missioners*, 77 *N. C.* 2; *Oil Co. v. Little Rock*, 39 *Ark.*

"412; *Spink v. Francis*, 19 *Fed. Rep.* 670, 20 *Fed. Rep.*
"567; *Suess v. Noble*, 31 *Fed. Rep.* 855; *in re Sawyer*,
"124 *U. S.* 210, 211, 8 *Sup. Ct. Rep.* 482; *High Inj.*
"*Sec.* 68.)'

"The cases at bar present in a forcible light the "inability of a court of equity to deal with criminal "prosecutions by injunction or otherwise, and the utter "confusion and failure of justice that would inevitably "result from the exercise of such jurisdiction. The "answers and affidavits filed in some of these cases "deny that the plaintiff's sales were limited to original "packages, and aver that they sold otherwise than in "original packages, and on the Lord's day and to mi-"nors, and that the business was conducted in such a "manner as to make it a nuisance. If the court should "assume jurisdiction of the cases, the chancellor, sitting "without a jury, would have to hear and determine all "these issues. And for what and with what result? If "the chancellor should find the plaintiffs had violated "the state law, as alleged by the defendants, he would "be powerless to punish them for the offense. If he "found the averments in the bill to be true, and granted "a perpetual injunction in the terms of the temporary "injunction in this case, the court could punish the de-"fendants, for a violation of the injunction, but it "would have no power to punish the plaintiffs for af-"terwards selling in violation of the state law. Sa-"loons are the source of a large percentage of the law-"lessness and crime in the land, and their proprietors "and managers are not particularly distinguished for "their strict observance of the laws regulating or re-"stricting the business. Suppose an original package "vendor, after securing a perpetual injunction, as "prayed in this case, sell liquor not in original pack-"ages, or otherwise violates the state law, what are "the officers of the state court, whose duty it is to "prosecute in such cases, to do? Must they apply to "this court for leave to prosecute before commencing "proceedings in the state court? Undoubtedly, if they "should proceed without the previous leave of the "court, the plaintiffs would charge them with a viola-"tion of the injunction, and ask the court to punish

"them for contempt; and the chancellor would again "be required to try the same issues of fact, with a view "to determine whether the state officers, including the "judges of the state courts, should be punished for "contempt, or whether such officers should graciously "have leave to prosecute the plaintiffs for a violation "of the criminal laws of the state. It is obvious that, "if this court once assumed this jurisdiction, it would "speedily draw to itself the supervision and control of "all the criminal prosecutions in the state growing out "of the traffic in liquor; for it is quite certain, if the "court once enters upon this business, that every ven- "dor of liquor in the state will claim to be a dealer "in original packages only, and whenever a prosecution "is commenced against him he will at once seek the "shelter and protection of an injunction from this "court. And the extraordinary spectacle would be pre- "sented of a United States court of chancery having its "whole time taken up in keeping watch and ward over "all the saloons in the state, protecting the proprietors "and their clerks from prosecutions, until it should "be first shown by the state to the satisfaction of the "chancellor that the state law has been violated, when "the chancellor would make an order granting the state "leave to prosecute for that violation."

Hemsley v. Myers, 45 Fed Rep 286.

It is our contention in this case, as was the contention of the defendants in the above case, that the allegation of appellant that he will sustain "irreparable damage and injury" is a *legal conclusion*, and that there are no facts alleged showing that appellant will sustain any damage that he cannot be fully compensated for in an action at law. In an action at law appellant may recover for labor done and material furnished in the erection of said gas works, and for whatever damage he may sustain under the contract.

Appellant in this case has a plain, speedy and ade-

quate remedy at law. And, moreover, as was said in the above decision, the appellant "can appeal from "the orders and judgments of the trial court to the "higher state court, *and if that court denies them any "right or privilege claimed under the Constitution or "laws of the United States,* he may appeal to the Su- "preme Court of the United States. *These are all the "rights that parties to a suit in any court can demand, "and in contemplation of law, they afford to every "suitor in connection with the remedy the law gives "for illegal and unwarranted prosecutions sufficient le- "gal redress.'*

One of the latest and best considered cases bearing upon the question as to whether a court of equity has power by injunction to restrain the execution of criminal statutes is the case of Fitts v. McGhee, reported in 172 U. S., page 516. In that case the plaintiff sought to restrain the enforcement of a penal statute of the state of Alabama. The bill alleged that the grand jury of Laudendale county, Alabama, had found a large number of indictments, some 100 or more in number, against the employees of the plaintiff. The bill further alleges that the said statute is invalid and void because in conflict with the Constitution of the United States, in that it deprived the plaintiffs of their property without due process of law, and denied them the equal protection of the laws The bill further alleged that said statute was invalid because unreasonable, and that the enforcement of said statute would cause the plaintiff great and *irreparable damage and injury, and would result in a multiplicity of actions.*

The Circuit Court, in said case, granted the injunction restraining the enforcement of said statute. From

the order granting the injunction an appeal was taken to the Supreme Court of the United States, and Mr. Justice Harlan, in rendering his decision reversing the Circuit Court, says, as follows:

* * * * * * * * *

"Under the view we take of the question, the citi-
"zen is not without effective remedy, when proceeded
"against under a legislative enactment void for repug-
"nancy to the supreme law of the land; *for, whatever*
"the form of proceeding against him, he can make his
"defense upon the ground that the statute is uncon-
"stitutional and void. And that question can ulti-
"mately be brought to this court for final determina-
"tion."

* * * * * * * * *

"It remains only to consider the case so far as the
"final decree assumes to enjoin the officers of the state
"from instituting or prosecuting any indictment or
"criminal proceedings having for their object the en-
"forcement of the statute of 1895. *We are of opinion*
"that the Circuit Court of the United States, sitting
"in equity, was without jurisdiction to enjoin the in-
"stitution or prosecution of these criminal proceedings
"commenced in the state court. This view is sustained
"In re Sawyer, 124 U. S. 200, 209, 210. * * * *

* * * * * * * * *

"At the present term of court, in Harkrader v. Wad-
"ley, 172 U. S. 148, 169, 170, we said: 'In proceed-
"ing by indictment to enforce a criminal statute the
"state can only act by officers or attorneys, and to en-
"join the latter, is to enjoin the state.' Again: *'Much*
"more are we of opinion that a Circuit Court of the
"United States, sitting in equity in the administration
"of civil remedies, has no jurisdiction to stay by in-
"junction, proceedings pending in a state court in the
"name of a state to enforce the criminal laws of the
"state. Undoubtedly, the courts of the United States
"have the power, under existing legislation, by writ
"of habeas corpus, to discharge from custody any per-
"son held by state authorities under criminal proceed-

"ings instituted under state enactments, if such enact-
"ments are void for repugnancy to the Constitution,
"laws or treaties of the United States. But even in
"such case we have held that this power will not be
"exercised, in the first instance, except in extraordinary
"cases, and the party will be left to make his defense
"in the state court. [Ex parte Royall, 117 U. S. 241.
"New York v. Eno, 155 U. S. 89. Witten v. Tomlin-
"son, 160 U. S. 231. Baker v. Grice, 169 U. S. 284].'

"But the existence of the power in the courts of the United States to discharge upon habeas corpus by "no means implies that they may, in the exercise of "their equity powers, interrupt or enjoin proceedings "of a criminal character in a state court. The plaint-"iffs state that the toll-gatherers in their service had "been indicted in a state court for violating the pro-"visions of the act of 1895 in respect of tolls. Let "them appear to the indictment and defend themselves "upon the ground that the state statute is repugnant "to the Constitution of the United States. The state "court is competent to determine the question thus "raised, and is under a duty to enforce the mandates "of the supreme law of the land. [*Robb v. Connolly,* "111 *U. S.* 624.]

"And if the question is determined adversely to the "defendants in the highest court of the state in which "the decision could be had, the judgment may be re-"examined by this court upon writ of error. That the "defendants may be frequently indicted constitutes no "reason why a Federal court of equity should assume "to interfere with the ordinary course of criminal pro-"cedure in a state court."

Fitts v. McGhee, 172 U. S. Rep. 528 et seq.

In the case of Minneapolis Brewing Co. v. McGillivray, 104 Fed. 258, a statement of the case as set out in the opinion of the court was as follows:

* * * * * * * * *

"That at all times mentioned in the bill the "plaintiff was, and now is, engaged in extensively man-"ufacturing and selling beer and other malt liquors,

"having its brewery or place of manufacture in the "city of Minneapolis. That for more than a year last "past plaintiff has owned and maintained, and still "owns and maintains, in the city of Madison, in the "county of Lake, in the state of South Dakota, a ware-"house or depository in which, during said times, it "has been storing, in original packages, a portion of "the product of its said brewery, under the circum-"stances and for the purposes hereinafter detailed.

* * * * * * * * * *

"That since the 1st day of July, 1900, the "defendant, in their official capacity aforesaid, and "claiming the right so to do under and pursuant to the "provisions of Chapter 72 of the Session Laws of "South Dakota for the year 1897, have demanded of "plaintiff that it pay for continuing to carry on its "said business at said city of Madison, and for the "continued operation and maintenance of its ware-"house at that place, the license fee of $600 specified "in Section 1 of said act upon the business of selling "only brewed or malt liquors at wholesale and that "plaintiff declined and refused to pay said fee upon the "ground that said statute so requiring its payment "was unconstitutional and void. That upon the re-"fusal of plaintiff to pay said license fee, and for the "alleged reason that it did not pay the same, the de-"fendants, claiming to act in their official capacity "as aforesaid, and claiming to be authorized by the "statute aforesaid, wrongfully and unlawfully threat-"ened to close said warehouse so operated and main-"tained by this plaintiff at said city of Madison afore-"said, and wrongfully and unlawfully threatened to "prosecute criminally this plaintiff and its said local "agent under Section 5 of said act, and to so prosecute "for each violation committed on each day if said "warehouse was continued to be operated as afore-"said by plaintiff, or if plaintiff continued to transact "the business theretofore transacted by it at said Mad-"sion. * * * * * * * * * *

"The plaintiff prays that said statute of the "state of South Dakota may be adjudged to be "unconstitutional and void, and that the defendants be

"permanently restrained and enjoined from attempt-"ing to enforce payment from plaintiff of said unlaw-"ful license fee of $600, and from in any wise inter-"fering with plaintiff's said warehouse at said city of "Madison, and its said business connected therewith."

The court said, in rendering its opinion:

"The only question that now presents itself is as to "the relief that this court has the power to grant the "complainant in this action. It is alleged in the bill "that the defendants, claiming to act in their official "capacity, threaten to close said warehouse so oper-"ated and maintained by this plaintiff at said city of "Madison aforesaid, and wrongfully and unlawfully "threaten to prosecute criminally this plaintiff and its "said local agent, under Section 5 of said act, and to "so prosecute for each violation committed on each "day, if said warehouse was continued to be operated "as aforesaid by plaintiff, or if plaintiff continued to "transact the business theretofore transacted by it at "said Madison. *In so far as this bill seeks to enjoin-"the commencement of criminal proceedings, it can-"not be maintained. A court of equity possesses no "such power. This is settled by a uniform current "of authorities in England for two centuries, and in "this country from the foundation of its jurispru-"dence."*

Minneapolis Brewing Co. v. McGillivray, 104 Fed. Rep. 259.

A BILL IN EQUITY WILL NOT LIE TO RESTRAIN PROSECUTIONS UNDER A MUNICIPAL ORDINANCE UPON THE MERE GROUND OF ITS ALLEGED INVALIDITY.

Upon this point we beg to cite the following decisions in which the question of the power of courts of equity to restrain criminal proceedings under alleged invalid statutes and ordinances was involved.

In the case of City of Denver v. Beede, 54 Pac. 624, the facts as stated by the court were as follows:

"Briefly, from the bill filed by appellee in the court "below, it appears that he is the proprietor of a theater "in the city of Denver, known as the "Orpheum," in "which he holds Sunday performances, without which, "it is alleged, he cannot successfully conduct his bus- "iness; that the city has passed an ordinance subject- "ing to a fine those conducting Sunday theatrical per- "formances similar to his. It is averred that this or- "dinance is invalid, and that the police authorities of "the city have arrested him for violation thereof, and "threaten in the event further Sunday performances "are given in his theater, to continue to arrest him "and his employees engaged therein, the result of "which, he alleges, will be to cause him irreparable in- "jury. On presentation of the bill a temporary in- "junction was issued, restraining appellants from ar- "resting or interfering with appellee or his employees "engaged in the conduct and management of his "theater on Sunday. Appellants interposed a general "demurrer to the bill, and motion to dissolve the writ, "both of which were overruled; and, having elected to "stand by their demurrer, the temporary injunction "was made permanent, from which judgments appel- "lants have appealed to this court.

"Gabbert, J., after stating the facts as above set "forth, rendered the following opinion:

" 'Two questions are urged by appellants in support "of their position that the judgment should be re-

"versed: First, insufficiency of the bill; second, *that* "the ordinance in question is invalid. The first ques- "tion to determine even though the ordinance may be "illegal, as charged, is *the sufficiency of the bill upon "which to predicate the judgment rendered, because, "if this should be resolved in favor of appellants, the "validity of the ordinance would not be involved,* and "it would be unnecessary, as well as improper, to pass "upon that question, as it would not be presented for "determination in this case. *The fundamental doc- "trine upon which the power of a court of equity rests "is that it proceeds only when there is no plain, ade- "quate and complete remedy in the law courts of which "the party invoking its aid can avail himself. This prin- "ciple is too elementary to require the citation of any "authority in its support,* and the real question is, has "the appellee, according to the averments of his bill, "a legal remedy which is adequate and sufficient for "the protection of his rights?

"A court of equity will not restrain a prosecution "at law when the question is the same at law as in "equity. Wallack v. Society, 67 N. Y. 23. An ex- "ception to this rule exists where an injunction is nec- "essary to protect a party from oppressive and vexa- "tious litigation, *but in such cases the court only acts "by granting an injunction after the controverted "rights has been determined in a previous action in "favor of the party applying for such relief. Id.* Ap- "pellee admits that he has violated this ordinance, and "inferentially avers his intention of doing so in the "future, but rests his right to the judgment rendered "upon the ground that the ordinance is invalid, and, "if the executive officers of the city are not restrained "from prosecuting him and his employees for such "violation, he will suffer irreparable injury. If the "ordinance is valid, then he cannot complain if he is "successfully prosecuted for its violation, no matter "what the result may be to his business. *If invalid, "that is a defense which he can interpose in the court "where originally prosecuted for such violation, or "in which such cases may be tried on appeal or error. "The legality or illegality of the ordinance is purely*

"a question of law, which it is competent for a court "at law to decide. We cannot assume that the courts "in which the validity of the ordinance is presented "will not decide this question correctly, nor are we ad- "vised what was the result of the trial of the cause in "which he was arrested, as alleged in his bill, or that "he has availed himself in that action of the defense "based upon the illegality of the ordinance. *The legal "presumption is that every court will decide questions "presented for its determination properly, and con- "duct proceedings before them fairly and impartially.* "(Wolfe v. Burke, 56 N. Y. 115); *so that it is at once "apparent that the main question upon which appellee "relies, namely, the invalidity of the ordinance, can "be presented and determined in any action which may "be instituted against him for the violation of his or- "dinance; and as the law is well settled by numerous "well considered cases that, as a general rule, a bill "in equity will not lie to restrain prosecutions under "a municipal ordinance upon the mere ground of its "alleged illegality, for the obvious reason that the "party prosecuted thereunder has a complete remedy "at law, because he can avail himself of such illegal- "ity as a legal defense in prosecutions thereunder.* "(*Poyer v. Village of Dos Plaines*, 20 *Ill. App.* 30; *"Levy v. City of Shreveport*, 27 *La.* 620; *Dill. Mun. "Corp., Secs.* 906, 908, *note; High. Inj., Sec.* 1244). *"it follows that the averment in the bill of appellee that "the ordinance of which he complains is invalid is not, "of itself, sufficient to entitle him to the relief granted "by the lower court.*

"It is urged by appellee that two other questions are "involved, which, in connection with the alleged in- "validity of the ordinance,—namely, irreparable in- "jury, and to prevent a multiplicity of suits,—are suf- "ficient to permit the judgment to stand. What is "meant by the expression "irreparable injury" is "clearly and concisely stated by our court of appeals "in the recent case of Watson v. Major, 50 Pac. 741, "where Judge Wilson, in speaking for the court, says: " 'In order to constitute irreparable injury within the "meaning of the law, the threatening of which would

"justify a court of equity in exercising its extraordi-
"nary power of injunction, *it must clearly appear, not*
"only that the wronged party could not be compen-
"sated in damages therefor, but also that the injury
"would follow if the court did not so interpose.'

"As before suggested, if this ordinance is invalid,
"we cannot assume that the court in which appellee
"may be tried for its violation will not so hold, if this
"question is presented; *nor can we presume that, if he*
"is acquitted upon this ground, the officers of the city
"will continue to harrass him with further arrests. So
"that, if his own contention be true, he is in no dan-
"ger of suffering the irreparable injury of which he
"complains; nor would he, under such circumstances,
"be subjected to a multiplicity of suits. It would
"doubtless be convenient for appellee to have the judg-
"ment of the court upon the validity of the ordinance
"before subjecting himself to liability for accumulated
"penalties; but, if arrested and convicted, and he
"chooses to take the chances of ultimately defeating
"the ordinance upon the ground of its invalidity, *that*
"is no ground for equitable interference. Wallack v.
"Society, supra. There are cases in which a munic-
"ipality will be restrained in equity from the enforce-
"ment of its ordinances, but an examination of the
"carefully considered cases on this subject leads us
"to the conclusion that the weight of authority is that
"the interposition of a court of equity can only
"be invoked in such cases clearly within the well-rec-
"ognized equitable rule above announced; and assum-
"ing, but not deciding, that, according to the aver-
"ments of the bill, the ordinance in question is illegal,
"the other elements necessary to entitle appellee to an
"injunction in this case are absent, and the demurrer
"to the bill should have been sustained.

City of Denver v. Beede, 54 Pac. Rep. 624.

And so we contend in this case, that if the city Ordinance No. 7029, under which appellant is being prosecuted, is invalid, that *"this invalidity constitutes a defense which it can interpose in the court where*

originally prosecuted, or in which such cases may be tried on appeal or error." And that *"the legality or illegality of the ordinance is purely a question of law, which it is competent for a court of law to decide."* And we earnestly insist that all the principles of law with reference to the power of a court of equity to restrain the enforcement of criminal laws, enunciated in the foregoing case, have full application to the facts in the case at bar.

"Nor can there be any for the proposition that the "court should declare void an unenforced municipal "ordinance. To do so would be to pass upon a mere "abstraction. *If the plaintiffs or any one else, should "violate the ordinance upon a criminal prosecution "for such violation, the validity of the ordinance, and "of the acts of the legislature authorizing and vali- "dating it, would come directly and properly before "the courts; or if the town, by arrest or otherwise, "should prevent the attempted violation, an action for "damages, as in the case cited, or an indictment, would "equally present the question."*

Wardens of St. Peter's Episcopal Church v. Town of Washington, 13 S. E Rep. 700.

"*Injunctions to prevent criminal prosecutions have "been held so completely beyond the jurisdiction of "courts of chancery that their decrees in such cases "have been disregarded as absolutely void in collateral "proceedings, and parties arrested for contempt for "violating their injunctions discharged on habeas cor-* "*pus. Ex parte* Sawyer, 124 U. S. 200, 8 Sup. Ct. "482, 31 L. Ed. 402. In this case the mere fact that "the injunction is not asked against the prosecuting "attorney of the state *eo nomine* can make little or no "difference. This court must look to the effects of "said restraining order and prayer for injunction, and "determine whether or not it enjoins or will enjoin,

"if granted, the institution of criminal proceedings to "enforce the act.

"Having examined the various allegations of the "bill for injunction, in our opinion it did not state a "cause which fell within the class of which the circuit "court had jurisdiction to grant an injunction, for "the reason that the alleged unconstitutionality of the "law alone furnishes no ground for injunction; and "because the circuit court had no jurisdiction to pre- "vent the institution of criminal proceedings by the "inspector by information to punish violations of said "act, and because, *in our opinion, the bill otherwise "charges no traversable facts showing a want of an "adequate remedy at law, but, on the contrary, shows "that the courts of law are open to the plaintiff in said "case to make their defense to any prosecution under "said act.*"

State v. Wood, 56 S. W. Rep. 477.

"A court of equity cannot grant an injunction "against the prosecution of criminal proceedings even "in cases of a criminal prosecution for trespass in "which a disputed property right is involved as to "which equity has jurisdiction to afford relief."

Crighto v. Dahmer (Miss.), 21 L. R. A. 84 and note.

"One court cannot entertain jurisdiction of an action "upon the ground that another court of competent "jurisdiction or another branch of the same court will "decide wrong or improperly. The legal presump- "tion is that every court will decide right and conduct "the proceedings before them fairly, impartially and "correctly. *By a threatened prosecution the plaintiffs "will not be injured in any such sense as entitles them "to invoke the equitable powers of the court.*"

Wolfe v. Burke, et al., 56 N. Y. 115.

"Assuming the unconstitutionality of the act of "1872, the plaintiff is not upon the facts stated in the "complaint entitled to an injunction. The general "rule is that the court will not restrain a prosecution

"at law when the question is the same at law and in "equity. An exception exists where an injunction is "necessary to protect a defendant from oppressive and "vexatious litigation. But the court acts in such cases "by granting an injunction only after the controverted "right has been determined in favor of the defendant "in a previous action. On this ground the Chancel- "lor in West v. the Mayor (10 Paige 539) dissolved "a temporary injunction restraining the defendant "from prosecuting suits against the complainant for "violation of a corporation ordinance claimed to be "invalid. *The unconstitutionality of the act of* 1872 *"would be a perfect defense to a prosecution for the "penalties given by it*, and the question as to the con- "stitutionality of the act has not been determined. It "would doubtless be convenient for the plaintiff to "have judgment of the court upon the constitutional- "ity of the act before subjecting himself to liability for "accumulated penalties. But this is not a ground for "equitable interference, *and to make it a ground of "jurisdiction in such cases would in the general result "encourage rather than restrain litigation."*

Wallack v. Society, etc., 67 N. Y. 28.

"The question as to the validity of the corporation "ordinances does not properly belong to this court for "decision, where the complainants, as in this case, have "a perfect defense at law if the ordinances are in- "valid. * * * And it would be an usurpation of "jurisdiction by this court if it should draw to itself "the settlement of such questions when their decis- "ion was not necessary to the discharge of the legiti- "mate duties of the court.

"In the case of Oakley v. the Mayor of N. Y., etc., "which was a bill for an injunction to restrain the "prosecution of suits at law under the market ordi- "nances it was decided that if the objection to the le- "gality of those ordinances were well taken the com- "plainant had a perfect defense at law. And that "this court would not grant an injunction to protect "him against a multiplicity of suits until his right

"to such protection had been established by a success-
"ful defense at law in some of the suits."

"In the present case the complainant's bill does not
"show that they have established their right at law,
"but on the contrary it is distinctly stated in the bill
"that in some of the suits which have been commenced
"the decision has been adverse to the complainants,
"and that the other suits have not yet been decided.
"It is true that they complain that in those cases the
"court decided the law against them and did not sub-
"mit the legality of the ordinance to the jury to be de-
"cided as matter of fact, and that they intended to
"carry the question as to such legality before a higher
"tribunal for decision. But neither of those circum-
"stances can give jurisdiction to this court to inter-
"fere before the right of the complainants is estab-
"lished by such higher tribunal. And if they are suc-
"cessful there it is not probable that the interference
"of this court will be necessary."

West v. Mayor of N. Y., 10 Paige 539.

"Accordingly as the ordinance involved in the pres-
"ent case (laundry ordinance) is with reference to
"means provided for its enforcement purely penal in
"its nature, the court below had no power upon an ap-
"plication for injunction against its enforcement to
"inquire into its validity either upon constitutional or
"other grounds and to enjoin the city from attempt-
"ing to enforce it. *If the ordinance is invalid by rea-*
"son of its unconstitutionality, or for other cause, such
"invalidity would be a complete defense to any pros-
"ecution that might be instituted for its violation."

City of Bainbridge v. Reynolds, (Ga.) 36 S. E. 934; 111 Ga. 758.

"A court of equity will not interfere by injunction
"to restrain the execution of a municipal ordinance of
"a criminal nature on the ground of the invalidity of
"such ordinance, *nor on the further ground that the*
"plaintiff is exempt from the operation of the same.
"The person affected has a full and adequate remedy

"at law to test the validity of the ordinance as well as "the question of his exemption from its operation."

Mayor v. Patterson, Ga. (1900) 34 S. E. 600

THE CASES RELIED UPON BY APPELLANT ARE NOT IN POINT OR HAVE BEEN OVERRULED.

Appellant has cited many cases which they say support their contention that "A court of equity has "power to restrain by injunction a municipality from "instituting criminal proceedings when such proceed-"ings are threatened under color of an invalid ordi-"nance for the purpose of compelling the relinquish-"ment of a property right;" but the court will find from an inspection of those cases that the property rights involved were not analogous to or parallel with the alleged property right of appellant herein, but of an entirely different nature and character. All of said cases so cited by appellant are clearly distinguishable from the one at bar. For instance, the case of Central Trust Company v. Citizens' St. R. Co., reported in 80 Fed. Rep. 225, and again in 82 Fed. Rep. 1, is a case where the City of Indianapolis attempted to enforce an ordinance changing the rate of street car fare to be charged by plaintiff from five to three cents for each passenger, and the company alleged that it would work them great and irreparable damage and injury, and entirely destroy their business. It requires no great stretch of the imagination to perceive how, for the plaintiff to have been compelled to cease conducting its street car business until a court of law could

in the regular order of business determine the merits of the case, would subject the plaintiff to great injury and damage and work a complete destruction of its business. How entirely different is the property right of appellant here. Moreover, as an authority this case of Central Trust Co. v. Citizens' St. R. Co., relied so implicitly upon by appellant, is not in point, and is contrary to and overruled by Fitts v. McGee, 172 U. S., hereinbefore cited.

We will now put a case parallel with the one at bar.

Suppose appellant were charged with the erection of a slaughter house, a powder magazine or pest house, under exactly similar conditions and circumstances and contractual relations that appellant is building this gas works, and the City of Los Angeles were seeking to enforce a penal ordinance against the erection of the same, similar to the ordinance under consideration, and adopted under similar circumstances, would a court of equity grant appellant an injunction restraining the city from enforcing the ordinance, and permit it to build and maintain said slaughter house. powder magazine or pest house until a court of law could pass upon the validity of the ordinance? We have an abiding conviction that a court of equity would do no such thing. It would be far better and more in consonance with the principles of equity and good government to permit the city to compel appellant to cease work on such buildings until the validity of the ordinance could be determined, rather than to compel the city to remain passive while such dangerous

institutions were being erected in its midst to the peril of its citizens.

So we say, in this case, it is better and more in consonance with the principles of equity, good conscience and good government, that appellant be compelled by the city to cease said work until the validity of the ordinance can be determined by a court of law than that the city's hands be tied by injunction and the municipality be compelled to remain idle while this menace to the safety, comfort and lives of her citizens is being erected in her midst.

We believe that equity will not be swift to imperil the lives, the property, the safety and the comfort of the people by staying municipalities from enforcing criminal ordinances such as the one under consideration.

The case of Lottery Co. v. Fitzpatrick, 3 Woods 222 Fed. Cases, No. 8541, which is another case that appellant herein relies most strongly upon and has cited in his argument oftener possibly than any other one, is in direct conflict with the decision of this Honorable Court in the case of Stone v. Mississippi, 101 U. S. 814, and as an authority is not only overruled by decision in Stone v. Mississippi, but also by Fitts v. McGee, 172 U. S. 516, and *Ex parte* Sawyer, 124 U. S. 200.

With reference to the case of City of Austin v. Austin City Cemetery Association, we have only to say that this case is in conflict with the practice and procedure of the State of California, and is in conflict with and disregards the general rule and uniform de-

cisions of the highest courts of the United States and of the several states. It certainly disregards the case of Wardens v. Washington, 109 N. C. 21; 13 S. E. 700, hereinbefore cited, a case where the only question considered by the court was the one of jurisdiction.

It is based on the decision in City of Atlanta v. Gas Light Co., 71 Ga. 106, which is distinguished in Paulck v. Sycamore, 104 Ga. 24, and City of Bainbridge v. Reynolds, 111 Ga. 758, where the true rule is stated. With due respect to the court that rendered the decision in said case of City of Austin v. Austin City Cemetery Assn., we submit that it is not in consonance with the general rule and not entitled to consideration as an authority.

The case of Reagan v. Trust Co., 154 U. S., where the Railroad Commissioners of the State of Texas attempted to fix rates, another case relied upon by appellant, is similar to the case of Central Trust Company v. Citizens' St. R. Co. *supra,* and is not analogous to the case at bar.

The M. Schandlar Bottling Co. v. Welch *et al.,* 42 Fed. Rep. 561 most strongly relied upon by appellant, was overruled by the decision in Hemsley *et al.* v. Myers *et al.,* reported in 45 Fed. 283 and hereinbefore quoted.

The case of Detroit v. Detroit Citizens' Street Railway Company, cited by appellant, is not a case in point with the one at bar. There was no *penal* ordinance or statute sought to be enforced against the party seeking the injunction; in fact, the injunction

was not asked to restrain the institution of any criminal proceedings, as was done in this case.

The court will further observe that Mr. Justice Peckham, who rendered the opinion in that case, iterates and reiterates "that no objection was taken to the jurisdiction of the court at any stage of the litigation;" nor was there any objection taken or insisted upon that there was a plain and adequate remedy at law. *Objections on both these grounds have been taken, and urged at all stages of the proceedings in this case, and therefore that decision has no bearing upon this controversy.*

With the exception of the case last mentioned, all the decisions relied upon by appellant in its brief were submitted to the Circuit Court and were fully considered by Judge Wellborn in his opinion rendered therein, which we quote in full, for the reason that it convincingly shows that there is no equity in the bill and that the authorities relied on by appellant on the question of jurisdiction are not in point.

"Complainant at the commencement of this suit "was erecting within the city of Los Angeles, for "and under contract with another party, a water "holder and gas tank, and filed its bill solely to en- "join threatened criminal prosecutions, under an "ordinance of said city alleged to be invalid, against "its employees for working on said structures, the "purpose and effect of which prosecutions, the bill al- "leges are to compel complainant to abandon said work, "and thereby destroy or impair its vested property "rights. The questions now presented for considera- "tion relate to the equitable jurisdiction of this court, "and the validity of said ordinance. These questions "will be taken up in the order of their statement, be-

"cause, if the jurisdiction does not exist, further in-
"quiry concerning the ordinance is unnecessary.

"The Supreme Court of the United States has said:

"The office and jurisdiction of a court of equity,
"unless enlarged by express statute, are limited to the
"protection of rights of property. It has no jurisdic-
"tion over the prosecution, the punishment or the par-
"don of crimes and misdemeanors, or over the ap-
"pointment or removal of public officers. To assume
"such a jurisdiction, or to sustain a bill in equity to
"restrain or relieve against proceedings for the pun-
"ishment of offenses or for the removal of public of-
"ficers, is to invade the domain of the courts of com-
"mon law, or of the executive and administrative de-
"partment of the government. * * *

"The modern decisions in England by eminent
"equity judges concur in holding that a court of chan-
"cery has no power to restrain criminal proceedings,
"unless they are instituted by a party to a suit already
"pending before it, and to try the same right that is
"in issue there. (*Attorney General v. Cleaver,* 18 *Ves.*
"211, 220; *Turner v. Turner,* 15 *Jur.* 218; *Saull v.*
"*Brown, L. R.* 10 *Ch.* 64; *Kerr v. Preston Corp,* 6
"*Ch. Div.* 463.)

"Mr. Justice Story, in his Commentaries on Equity
"Jurisprudence, affirms the same doctrine. Story Eq.
"Jur., Sec. 893. And in the American courts, so far
"as we are informed, it has been strictly and uni-
"formly upheld and has been applied alike whether
"the prosecutions or arrests sought to be restrained
"arose under statutes of the state or under municipal
"ordinances. (*West v. Mayor, etc.,* 10 *Paige,* 539;
"*Davis v. Society,* 75 *N. Y.* 362; *Tyler v. Hamersley,*
"44 *Conn.* 419, 422, 26 *Am. Rep.* 471; *Stuart v.*
"*Board,* 83 *Ill.* 341, 25 *Am. Rep.* 397; *Devron v.*
"*First Municipality,* 4 *La. Ann.* 11; *Levy v. City of*
"*Shreveport,* 27 *La. Ann.* 620; *Moses v. Mayor, etc.,*
"52 *Ala.* 198; *Gault v. Wallis,* 53 *Ga.* 675; *Phillips v.*
"*City of Stone Mountain,* 61 *Ga.* 386; *Cohen v. Golds-*
"*boro Comr's,* 77 *N. C.* 2; *Waters-Pierce Oil Co. v.*
"*City of Little Rock,* 39 *Ark.* 412; *Spink v. Francis,*
"19 *Fed.* 670; *Ind. (C. C.)* 20 *Fed.* 567; *Suess v.*

"*Noble* (*C. C.*) 31 *Fed.* 855; *Ex Parte Sawyer*, 8 *Sup.* "*Ct.* 482, 124 *U. S.* 200, 31 *L. Ed.* 402.)

"To the same effect are the following cases:

"(*Suess v. Noble*, (*C. C.*) 31 *Fed.* 855; *Hemsley v.* "*Myers and other cases, including M. Schandler* "*Bottling Co. v. Welch* (*C. C.*) 45 *Fed.* 283; *Brewing* "*Co. v. McGillivray*, (*C. C.*) 104 *Fed.* 272; *Crighto* "*v. Dahmer*, (*Miss.*) 13 *South* 237, 21 *L. R. A.* 84, "35 *Am. St. Rep.* 666; *City of Denver v. Beede*, (*Colo.* "*Sup.*) 54 *Pac.* 624; *Wardens of St. Peter's Episcopal* "*Church v. Town of Washington* (*N. C.*) 13 *S. E.* "700; *City of Moultrie v. Patterson* (*Ga.*) 34 *S. E.* "600.)

"The clear and positive declaration of law by the "highest judicial tribunal of the land in *Ex parte* "Sawyer, *supra*, is, without the other citations, de- "terminative of the case at bar, since the prosecu- "tions here sought to be enjoined are outside the ex- "ception to and fully within the general rule enun- "ciated in the Sawyer case.

"Complainant, however, contends that said rule is "further restricted to the extent indicated by the fol- "lowing excerpts:

" 'Writers on equity jurisdiction properly say that "the court of chancery does not deal with matters of "crime, misdemeanors, offenses against prohibitory "laws, nor questions of mere morality. But there is "this reservation: that it is only when those matters "are not connected with rights of property with re- "spect to which the court has jurisdiction. Circum- "stances may confer a jurisdiction. Attorney Gen- "eral v. Cleaver, 18 Ves. 211; Macaulay v. Shackell, "1 Bligh (N. R.) 96. In Spinning Co. v. Riley, L. "R. 6 Eq. 558, the vice-chancellor says: 'The juris- "diction of this court is to protect property and it will "interfere by injunction to stay any proceedings, "whether connected with crime or not, which go to "the immediate or tend to the ultimate destruction of "property, or to make it less valuable for use or oc- "cupation.' Lottery Co. v. Fitzpatrick, 15 Fed. Cas. "984. (No. 8, 541).

"Counsel urged that this bill does not show a cause

"of action cognizable in chancery against Mr. Wilt-
"sie, the district attorney, since its purpose is to re-
"strain him from instituting prosecutions under color
"of the amendment of 1897. But this complainant is
"seeking to protect a property right, and it seems to
"be law that when such prosecutions are threatened,
"under color of an invalid statute, for the purpose of
"compelling the relinquishment of a property right,
"the remedy in chancery is available. Central Trust
"Co. v. Citizens' St. R. Co., (C C.) 80 Fed. 225.
"'If the charge be of a criminal nature, or offense
"against the public, and does not touch the enjoyment
"of property, then a court of equity should not inter-
"pose by injunction.' On the other hand, where it
"is manifest, as in this case, that a prosecution and ar-
"rest is threatened for an alleged violation of city or-
"dinances for the sole purpose of preventing the ex-
"ercise of civil rights conferred directly by law, in-
"junction is a proper remedy to prevent injury to the
"party thus menaced. City of Atlanta v. Gate
"City Gaslight Co., 71 Ga. 126. Besides the
"three cases last named, complainant also cites
"in support of its contention the following:
"(*Regan v. Trust Co.*, 154 *U. S.* 388, 14 *Sup. Ct.*
"1047, 38 *L. Ed.* 1014; *Los Angeles City Water Co.*
"*v. City of Los Angeles*, (*C. C.*) 103 *Fed.* 711; *M.*
"*Schandler Bottling Co. v. Welch*, (*C. C.*) 42 *Fed.*
"561; *City of Rushville v. Rushville Natural Gas Co.*,
"(*Ind. Sup.*) 28 *N. E.* 853, 15 *L. R. A.* 321; *Spinning*
"*Co. v. Riley*, *L. R.* 6 *Eq.*, 558; *City of Austin v. Aus-*
"*tin City Cemetery Ass'n.* (*Tex. Sup.*) 28 *S. W.* 528;
"*Mayor, etc., v. Radecke*, 49 *Md.* 217, 33 *Am. Rep.*
"239; *Port of Mobile v. Louisville & N. R. Co.*,
"(*Ala.*) 4 *South* 106, 15 *Am. St. Rep.* 342; *Wood v.*
"*City of Brooklyn*, 14 *Barb.* 425; *Iron Works v.*
"*French*, 12 *Abb. N. C.* 466.)

"While it is not my purpose to examine in detail all
"of complainant's citations, brief reference will be
"made to a few of them.

"The opinion of the Lottery case, *supra*, as shown
"by the above quotation therefrom, rests largely upon a
"principle of equity, well recognized, but which, it
"seems to me, was inapplicable. The same is true of

"City of Atlanta v. Gate City Gaslight Co., *supra*, "where the opinion quotes from Kerr on Injunctions "the principle to which I refer, as follows:

" 'A court of equity, said Kerr (Injunctions, 2), has "no jurisdiction in matters merely criminal or merely "immoral, which do not affect any right of property. "If a charge be of a criminal nature, or of an offense "against the public peace, and does not touch the en- "joyment of property, jurisdiction cannot be enter- "tained. * * * * * But if an act which is also "criminal touches also the enjoyment of property, the "court has jurisdiction, but its interference is founded "solely on the ground of injury to property. (71 "*Ga.* 126.)'

"In City of Austin v. Austin City Cemetery Ass'n. "(Tex. Sup.) 28 S. W. 529, the court discerns and "states the inapplicability of the principle as follows:

" 'Yet it has been held that the court will interfere "to prevent acts amounting to crime, if they do not "stop at crime, but also go to the destruction or de- "terioration of the value of property. (*Spinning Co. "v. Riley*, 6 *Eq.* 551.) This, however, does not as- "sist us materially in the solution of the present ques- "tion. It would seem clear that if a party could be "enjoined from doing an act, not criminal in its na- "ture, which is injurious to the property of another, "he could also be enjoined if the act be one made pun- "ishable by law as a crime. The punishment of the "criminal, when the act committed has injuriously af- "fected the value of the property of another, does not "repair the injury. The question under consideration "arises upon quite a different case.'

"The principle of equity above stated, whose mis- "application has led to erroneous conclusions, as I con- "ceive, in some of the cases cited by complainant, "means simply that the fact that a threatened act, if "done, would be a crime, will not prevent a court of "equity from enjoining the commission of the act, "where it would also be an invasion of complainant's "property rights, and the other requisites to equitable "relief concur.

"The case most frequently cited for this principle is

"Spinning Co. v. Riley, L. R. 6. Eq. 551, where, at "page 558, the court, without reference to its facts, "says:

" 'The jurisdiction of this court is to protect prop- "erty, and it will interfere by injunction to stay any "proceedings, whether connected with crime or not, "which go to the immediate, or tend to the ultimate, "destruction of property, or make it less valuable for "use or occupation.'

"This quotation, although so often otherwise as- "sumed, has no reference whatever to criminal prose- "cutions, or even to civil suits; but the word 'pro- "ceedings' therein employed, has an entirely different "application, as clearly appears from the facts stated "in the syllabus of the case, which is as follows:

" 'The defendants, who were officers of a trades "union, gave notice to workmen, by means of pla- "cards and advertisements, that they were not to hire "themselves to the plaintiff pending a dispute between "the union and the plaintiffs. The bill prayed an in- "junction to restrain the issuing of the placards and "advertisements, alleging that by means thereof the "defendants had in fact intimidated and prevented "workmen from hiring themselves to the plaintiffs, and "that the plaintiffs were thereby prevented from con- "tinuing their business, and that the value of their "property was seriously injured and materially dimin- "ished. Held, upon demurrer, that the acts of the de- "fendants, as alleged by the bill, amounted to crime, "and that the court would interfere by injunction to "restrain such acts, inasmuch as they also tended to "the destruction or deterioration of property.' L. R. "6 Eq. 551.

"As a further abstract statement of the law con- "cretely enunciated in said syllabus, substantially, "however, to the same effect as the one above quoted, "the court, at page 560, says:

" 'The truth, I apprehend, is that the court will in- "terfere to prevent acts amounting to a crime, if they "do not stop at crime, but also go to the destruction or "deterioration of the value of property.'

"This rule has no connection with, or relation

"whatever to, the question of the power of a court of "equity to enjoin criminal prosecutions, and I am un- "able to accept as well reasoned any conclusion which "results from confounding the two matters.

"In Reagan v. Trust Co. neither the opinion of "court nor briefs of counsel discuss or in any way "refer to the question last mentioned, and this, doubt- "less, for the reason that the proceedings there en- "joined were not criminal prosecutions, but civil ac- "tions to recover statutory forfeitures and penalties, "and moreover in that case there were other grounds "for equitable relief.

"In Los Angeles City Water Co. v. City of Los "Angeles, of the numerous authorities which the opin- "ion cites concerning the remedy by injunction, not "one touches the question of equitable cognizance over "criminal prosecutions; and the inference is a fair one "that it was not presented in argument, or specially "considered by the court. Furthermore, there was "jurisdiction in the case to enjoin civil suits for the "forfeiture of complainant's property; and it was, no "doubt, assumed, by all the parties (whether correctly "or otherwise need not now be considered) that the "courts having acquired jurisdiction for one would "exercise it for all purposes.

"In M. Schandler Bottling Co. v. Welch, (C. C.) "42 Fed. 561, on which complainant seems to place "much reliance, the opinion of Phillips, district judge, "was filed July 18, 1890, on the granting of a tempo- "rary injunction. Afterwards, to-wit, February 18, "1891, the same case was heard on demurrer before "Caldwell, circuit judge, when the demurrer was sus- "tained, the temporary injunction was dissolved, and "the bill dismissed for want of equity. (45 Fed. 283.) "On the first hearing the court said:

" 'The remaining question not disposed of in that "discussion is whether or not this suit is obnoxious to "the objection that a court of equity never extends its "jurisdiction to the enjoining of criminal proceedings. "This is unquestionably a well-settled rule of equity "jurisprudence. (Kansas City Cable Co. v. City of "Kansas City, 29 Mo. App. 89, and loc. cit.) This

"question underwent extensive discussion in *Ex parte* "Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. "402. Mr. Justice Gray, who delivered the majority "opinion, said, *inter alia:* "The office and jurisdic- "tion of a court of equity, unless enlarged by express "statute, are limited to the protection of rights of "property. It has no jurisdiction over the prosecution, "the punishment, or the pardon of crimes or misde- "meanors. * * * * * To assume such a juris- "diction or to sustain a bill in equity to restrain or "relieve against proceedings for the punishment of "offenses, * * * * is to invade the domain of "the courts of common law." Without stopping to "consider whether this general rule is limited to crim- "inal proceedings already begun in the court of crim- "inal jurisdiction, it is sufficient to the matter in hand "to say, as indicated in the quotation above made, that "the rule has its exceptions. One of these is where "a threatened criminal proceeding is hostile, vexatious, "and unwarranted, and involves the wanton destruc- "tion of, or injury to, property interests of the ac- "cused, and especially so under circumstances where, "if permitted to proceed, the party injured would have "no adequate remedy at law for restitution. Mr. Jus- "tice Gray recognizes this. He quotes from Sheridan "v. Colvin, 78 Ill. 327: 'It is elementary law that the "subject matter of the jurisdiction of a court of chan- "cery is civil property. The court is conversant only "with questions of property and the maintenance of "civil rights. Injury to property, whether actual or "prospective, is the foundation on which the jurisdic- "tion rests. The court has no jurisdiction in matters "purely criminal or merely immoral, which do not af- "fect any right to property.' Again he says: 'No "question of property is suggested in the allegations "of matters of fact in the bill, or would be involved in "any decree that the court could make thereon.' 42 "Fed. 563.

"On the latter hearing the court said:

" 'The bill seeks to enjoin criminal proceedings. A "court of equity possesses no such power. This prin- "ciple is settled by the uniform current of authorities

"in England for two centuries, and in this country "from the foundation of its jurisprudence. The re- "cent emphatic reaffirmance of the doctrine by the Su- "preme Court of the United States renders it unneces- "sary to do more than repeat the rule in the language "of the court.'

"Then follows the quotation which I have already "given from *Ex parte* Sawyer, *supra*.

"Thus it will be seen that the latter decision, al- "though not so in terms, is substantially a reversal of "the former one. It will also be noted that the opinion "on the first hearing, when the temporary injunction "was granted, seeks to draw support from *Ex parte* "Sawyer, by quoting certain expressions of Mr. Jus- "tice Gray with reference to property rights and civil "rights. Obviously, however, these expressions were "used by Mr. Justice Gray not to suggest a further ex- "ception, but merely to show that the facts of the case "did not bring it within the exception embodied in his "previous statement of the general doctrine, which I "have already quoted, namely (the italics being mine):

" 'The modern decisions in England by eminent "equity judges concur in holding that a court of chan- "cery has no power to restrain criminal proceedings, *"unless they are instituted by a party to a suit already "pending before it, and to try the same right that is in "issue there.'*

"This unambiguous and definite statement of the "rule does not admit of any exception other than the "one which it expressly allows. Besides, a careful exam- "ination of at least one of the authorities cited (Suess "v. Noble (C. C.) 31 Fed. 855) shows that no other "exception could have been in the mind of the court. "The following is the statement of the case:

" 'The original cause of State v. Suess was removed "from the district court of Jefferson county, Iowa, to "this court upon the petition of said Suess, and the "same is now pending here. The transfer was made "in pursuance of the decision of the circuit judge "(Brewer) in the case of State v. Walruff (C. C.) 26 "Fed. 178. The purpose of that proceeding was to "have the brewery owned and maintained by said

"Suess declared a nuisance, and, as such, perpetually "enjoined and abated. A temporary restraining or- "der, which is still in full force, was issued from this "court, the purpose of which was to restrain certain "persons, who were carrying on the civil proceedings "in the state court, from prosecuting the same to the "injury and virtual destruction of the property pend- "ing the determination of the question of the jurisdic- "tion of this court over the subject-matter of the said "original suit. Lewis Suess now presents his petition "to this court against the above-named defendants "and others, alleging that they are engaged in com- "mencing and carrying on many criminal prosecutions "against him before certain justices of the peace "for "each separate sale of beer at his brewery," and that "they propose "to place him on trial and find him "guilty of selling intoxicating liquors, and to impose "upon him heavy fines for said alleged offenses," etc. "He also states in a supplemental petition, that he was "indicted at the January term of the district court of "said county for the alleged crime of causing a nui- "sance by the sale of beer at his brewery, that he was "convicted of said alleged offense, and that he has "taken an appeal to the Supreme Court of Iowa upon "the federal question as to the constitutionality of the "prohibitory law, etc. The prayer of his petition is "that this court issue an injunction restraining said "defendants from the prosecution of said criminal "suits in violation of his rights respecting the subject- "matter of the action now pending in this court until "the final determination of the same.'

"Thus it will be seen that the criminal prosecutions "sought to be enjoined were one of the means em- "ployed to close up the complainant's business, and "yet the court held (quoting the syllabus):

" 'No power exists in any court of equity to inter- "fere by injunction with the prosecution and punish- "ment of crimes and offenses in the courts of the com- "mon law.'

"In the quotation which Mr. Justice Gray makes "from the Illinois case of Sheridan v. Colvin, the "phrase, 'The court has no jurisdiction in matters

"purely criminal or merely immoral which do not af-
"fect any right to property,' has no reference to crim-
"inal prosecutions, but was simply intended to declare
"that a court of equity would not interfere with acts
"merely on the ground of their immorality, or because
"they would, if committed, be crimes. So that the
"decision in *Ex parte* Sawyer, *supra*, whether we look
"solely to its text or the supporting authorities, is, as
"I have before stated, conclusive against complainant's
"contention.

"In addition to what has already been said, it may
"be appropriately observed that municipal and state
"regulations of saloons, beer halls, theaters and places
"of amusement generally, market places, slaughter
"houses, gas works, powder magazines, laundries,
"cemeteries, fire limits, streets (particularly obstruc-
"tions, railway tracks, telegraph poles, pipe lines, etc.,
"therein), indeed of all establishments, trades, and oc-
"cupations subject to the police power of the state,—
"unavoidably affect property rights, and are usually
"rendered effective by making their violations punish-
"able offenses. Now, if there were such jurisdiction
"as that for which complainant contends, every
"controversy over the validity of an ordinance or
"statute relating to any of the matters enumerated
"would furnish an occasion for interference by injunc-
"tion; and thus would be presented the remarkable
"situation of courts of equity, state and federal, exer-
"cising supervisory power over the administration of
"a part, not inconsiderable, of the criminal laws of
"the country.

"The jurisdiction asserted by complainant does not,
"in my opinion, exist, and for that reason the tempo-
"rary injunction applied for will be refused."

Davis & Farnum Mfg. Co. v. City of Los Angeles,
115 Fed. 537

We desire now to call the attention of the court to two cases cited by appellant's counsel in their brief, and relied upon by them as decisive of the unconstitutionality of this ordinance.

The first is the case of the City of Buffalo v. Chadeayne, 31 N. E. Rep. 443, and cited in their brief at page 86. The facts of that case were as follows: The City of Buffalo by ordinance established a certain fire district and gave a citizen of said city a permit to erect seven frame buildings within that district; after he had obtained said permit and laid the foundations for the buildings, the city passed an ordinance changing the district and purporting to make it unlawful to erect such buildings at the point where these were being erected.

With one exception, the case was parallel to the one at bar. But that exception is a material and vital one. The exception is that no such delegation of the "police power" had been made to the City of Buffalo by the State of New York as has been granted to the City of Los Angeles by Art. XI., Sec. 11, of the Constitution of the State of California.

The court, in rendering its opinion, says:

"It is claimed by the appellant that a municipal board "may reconsider its action at any time before private "vested rights have resulted from such action, and that "the defendant could not acquire vested rights as "against the police power of the state or municipality. *"For the purposes of this case we may concede these propositions.* As to the first, it appears,as we have seen, "that the defendant had entered upon the construction "of his buildings, had made contracts, and incurred lia-"bilities thereon, before the Common Council attempted "to reconsider its action, giving him a permit to con-"struct of wood. A private property right had, there-"fore vested in him prior to the rescission of the resolu-"tion. *As to the second, his right may be subject to "the police power of the state, but the difficulty is that "the state has not seen fit to deprive him of such right*

"by the exercise of such power, nor has it delegated the "same to the municipality."

From a perusal of the above quotation, it is plain that the decision of the Supreme Court declaring such ordinance invalid was made to depend not upon the theory that it was beyond the power of the state to pass such a law, but on the fact that the State of New York, in which the "police powers" naturally inhere, had not, prior to the enactment of said ordinance, delegated "general police powers" to the City of Buffalo, and that the police powers that had been delegated to the said city by the state prior to the enactment *were not sufficiently plenary to authorize it to pass the ordinance in question.* The court as much as says that petitioner's right to finish the erection of said buildings was subject to the "police powers" of the state. So that we see that the said case of The City of Buffalo v. Chadeayne, instead of supporting the contention of petitioner, is really in direct conflict with it.

The other case that we desire to call the attention of the court to is the case of Barthet v. City of New Orleans, reported in 24 Federal Rep. 563, and cited by appellant at page 84 of its brief.

The facts of said case were as follows: The plaintiff Barthet erected a slaughtering house and established a slaughtering business in the City of New Orleans under an ordinance that permitted him so to do. Afterwards the City of New Orleans enacted an ordinance making it unlawful to carry on the slaughtering business in the district wherein Barthet's slaughter house was situated, *"except permission be granted "by the council of the City of New Orleans."* The

court will see at once that by the addition of the clause, *"except permission be granted by the council of the "City of New Orleans,"* the council destroyed the *equal and undiscriminating and general application* of the law embodied in the ordinance, and attempted to make the right of Barthet, and indeed of any other person who wished to engage in the slaughtering business, depend upon the mere whim and caprice of the council. Because of this obnoxious clause of the ordinance the Circuit Court of the United States rightfully declared the ordinance invalid. The court, in its opinion, says: "The amendment of May 19th *is, we think, "unconstitutional, in the fact that if it is carried out, as "the City Attorney admits it will be, it will make Bar-"thet's right* to engage in a lawful business dependent "on the arbitrary will of an individual or a body of in-"dividuals acting for the city. * * * The right "to grant permission to A to carry on his lawful busi-"ness carries with it necesarily the power to deny per-"mission to B to exercise the same privilege. The com-"plainant is entitled, in common with all persons, to "equal protection. Applying this principle to this case, "Barthet is entitled to carry on his trade within the "limits already laid out by the city in pursuance of the "articles herein cited. *If the city council, as the matter "now stands, can prevent him from so doing, simply "because he has not their permission, then he has not "that equal protection of the law granted in the Con-"stitution."*

So the court will perceive that this case does not hold that the City of New Orleans could not, under its "police powers," enact an ordinance that would make it unlawful for Barthet to carry on his business at the point where his establishment was situated. Nor does it hold that the ordinance was unconstitutional

because it impaired any vested right of Barthet, but on the contrary, it declared that the invalidity of the ordinance consisted in the fact that the application depended upon the mere will of individuals.

THE ENACTMENT OF ORDINANCE NO. 7029 (NEW SERIES) IS FULLY WITHIN THE POLICE POWERS DELEGATED TO THE CITY OF LOS ANGELES BY THE STATE.

The validity of this ordinance is assailed by appellant on several grounds, which we will enumerate and discuss later herein. Our contention is that said ordinance was passed by the city council in the exercise of its police powers granted to it by the constitution of the State of California, by its charter and by the general laws of the state.

In arriving at a decision as to the validity of this ordinance the court must consider it in connection with and look at it in the light of those facts and circumstances which the law says the court may take judicial cognizance of. The decisions both state and federal are uniformly to this effect. Some of them we quote hereafter. Now let us see what these facts and circumstances are, of which the court may take judicial cognizance. We do not propose to attempt to enumerate them all, but the most important ones are: That the City of Los Angeles is a large city, having more than 100,000 inhabitants; that portions of the city are devoted to residence purposes exclusively,

and such portions are densely populated; that the district described in Ordinance No. 7029 embraces more than two square miles of territory; that gas is an extremely volatile, inflammable, combustible and explosive, poisonous substance; that its manufacture is attended with noxious smoke in great quantities and extremely offensive odors deleterious alike to the health and comfort of all persons living in the immediate vicinity of the works; that the storage of it in any considerable quantity is a constant menace to all buildings adjoining or in close proximity, as the learned judge in the case of Cleveland v. Citizens' Gas Light Co., 20 N. J. Eq. at page 205 says.

"Any business, however lawful, which causes an-
"noyances that materially interfere with the ordinary
"comfort, physically, of human existence, is a nuisance
"that should be restrained; and smoke, noise and bad
"odors, even when not injurious to health, may render
"a dwelling so uncomfortable as to drive from it any
"one not compelled by poverty to remain.

"*Unpleasant odors, from the very constitution of*
"*our nature, render us uncomfortable, and when con-*
"*tinued or repeated make life uncomfortable. To live*
"*comfortably is the chief and most reasonable object of*
"*men in acquiring property as the means of attaining*
"*it; and any interference with our neighbor in the com-*
"*fortable enjoyment of his life, is a wrong which the*
"*law will redress.* The only question is what amounts
"to that discomfort from which the law will protect.

"The discomforts must be physical, not such as de-
"pend upon taste or imagination. But whatever is
"offensive physically to the senses, and by such offen-
"siveness makes life uncomfortable, is a nuisance; and
"it is not less so because there may be persons whose
"habits and occupations have brought them to endure
"the same annoyances without discomforts. Other per-
"sons or classes of persons whose senses have not

"been so hardened and who by their education and "habits of life retain the sensitiveness of their natural "organization, are entitled to enjoy life and comfort as "they are constituted. The law knows no distinction "of classes, and will protect any citizen or class of citi- "zens from wrongs and grievances that might perhaps "be borne by others without suffering or much incon- "venience. * * * With regard to the coal tar, the "ammoniacal water and other liquid products of the "manufacture of gas, the cistern and plan for convey- "ing them to it and emptying them from it, if it can be "and shall be faithfully carried out, may prevent the "effluvia that usually arises from these sources.

"I cannot say that it will not; at least I cannot, "from any evidence in the case, or from any facts or "principles from which I may be entitled to take cog- "nizance. The plan seems to me not only ingenious "but sensible and plausible. *Yet the subtle and pene- "trating nature of the effluvia that attends the manu- "facture of gas is so great that I have doubt of the "experiment until demonstrated by success.* * * *

"And I wish to be understood that while I say it is "not shown to me to be impossible to manufacture gas "at the distance proposed from the buildings of the "complainant without material annoyance, yet I much "doubt if it will ever be done in practice. Many things "scientifically and theoretically possible are never ac- "complished in practice."

Now, looking at this ordinance in the light of the foregoing circumstances, let us see if the City of Los Angeles has authority to enact it, or if it is obnoxious to any constitutional provision, or to any general law of the state. We contend that the city derives its power to enact this ordinance, from three sources, any one of which would be sufficient authority:

1st. From the Constitution of the State of California, Section 11, Article XI, which reads as follows:

"ANY COUNTY, CITY, TOWN OR TOWNSHIP MAY "MAKE AND ENFORCE WITHIN ITS LIMITS ALL SUCH "LOCAL, POLICE, SANITARY AND OTHER REGULATIONS "AS ARE NOT IN CONFLICT WITH GENERAL LAWS."

2d. From the charter of Los Angeles city, the sections of which appertaining thereto are as follows:

Article I, Section 2 of the charter provides as follows:

"THE SAID CORPORATION SHALL HAVE THE "POWER . . . . . (SUB. 22) TO MAKE AND EN- "FORCE WITHIN ITS LIMITS SUCH LOCAL, POLICE, SAN- "ITARY AND OTHER REGULATIONS AS ARE NOT IN "CONFLICT WITH GENERAL LAWS, AND ARE DEEMED "EXPEDIENT TO MAINTAIN THE PUBLIC PEACE, PRO- "TECT PROPERTY, PROMOTE THE PUBLIC MORALS, "AND TO PRESERVE THE HEALTH OF ITS INHABIT- "ANTS." (STATUTES 1889, P. 458) . . . . . (SUB. 13) "TO LICENSE AND REGULATE THE CARRYING ON OF "ANY AND ALL PROFESSIONS, TRADES, CALLINGS AND "OCCUPATIONS CARRIED ON WITHIN THE LIMITS OF "SAID CITY . . . AND TO SUPPRESS AND PROHIBIT " . . . . . THE KEEPING OF BEES WITHIN THE "CITY LIMITS AND ANY AND ALL OBNOXIOUS, OF- "FENSIVE, IMMORAL, INDECENT, OR DISREPUTABLE "PLACES OF BUSINESS OR PRACTICE." (STATUTES 1889, 457) . . . . . (SUB. 23) "TO EXERCISE ALL "MUNICIPAL POWERS NECESSARY TO THE COM- "PLETE AND EFFICIENT MANAGEMENT AND CONTROL "OF THE MUNICIPAL PROPERTY, AND FOR THE EFFI- "CIENT ADMINISTRATION OF THE MUNICIPAL GOVERN- "MENT, WHETHER SUCH POWERS BE EXPRESSLY "ENUMERATED OR NOT, EXCEPT SUCH POWERS AS "ARE FORBIDDEN OR ARE CONTROLEED BY GENERAL "LAWS." (STATUTES 1889, P. 458.)

Section 27 of the Article III of the charter pro provides as follows:

"IT (THE COUNCIL) SHALL BY ORDINANCE, REGU-
"LATE, AND MAY PROHIBIT THE KEEPING OF GUN
"POWDER, ACIDS, OR OTHER EXPLOSIVE, COMBUSTI-
"BLE OR INFLAMMABLE MATERIAL WITHIN THE
"LIMITS OF THE CITY, OR ANY SPECIFIED PART
"THEREOF."

Section 40 of Article III of the charter provides as follows:

"THE COUNCIL SHALL ALSO HAVE FULL POWER
"TO PASS ORDINANCES UPON ANY OTHER SUBJECT
"OF MUNICIPAL CONTROL OR TO CARRY INTO EFFECT
"ANY OTHER POWERS OF THE MUNICIPALITY." (STAT-
UTES 1889, P. 465.)

3d. From the general laws of our state with reference thereto, which read as follows:

Subdivision four of the act of the legislature for the year 1869-70, found in the statutes of 1869-70 at page 815; also in Deerings Penal Code of the State of California at page 579, provides as follows:

"LOCATION OF WORKS.

"SEC. 4. IN ADDITION TO THE FOREGOING PRO-
"VISIONS THE AUTHORITIES OF SUCH TOWNS AND
"CITIES SHALL AFFIX TO EVERY LICENSE OR CON-
"TRACT SUCH CONDITIONS AS WILL BE FOR THE BEN-
"EFIT OF THE PUBLIC, AND MAY SECURE THEIR EN-
"FORCEMENT BY ANY ORDERS OR ORDINANCES
"WHICH THEY MAY DEEM NECESSARY. THEY MAY
"ALSO CONTROL THE LOCATION AND CONSTRUCTION
"OF WORKS, SO THAT THEY MAY BE ERECTED IN SUIT-
"ABLE LOCALITIES TO GIVE THE LEAST DISCOMFORT
"OR ANNOYANCE TO THE PUBLIC."

This was an act relating to gas companies and gas works, and was expressly continued in force by subdivision 20, section 19, of the Political Code of this state.

Section 4413 of the Political Code of our state provides as follows:

"IN GRANTING AUTHORITY TO LAY DOWN PIPES, "AND IN CONTRACTING FOR GAS AND WATER, THE "COMMON COUNCIL MUST IMPOSE SUCH RESTRIC- "TIONS AND CONDITIONS AND PROVIDE FOR SUCH LO- "CATIONS AND CONSTRUCTION OF GAS AND WATER "WORKS AND PIPES AS TO WORK THE LEAST POSSI- "BLE PUBLIC OR PRIVATE INCONVENIENCE, AND PRO- "VIDE FOR ENFORCING SUCH RESTRICTIONS AND "CONDITIONS"

The question now to be determined is whether or not this ordinance is a valid ordinance and can be enforced against any person. If it can be lawfully enforced against a person who subsequent to the enactment thereof has purchased a piece of property without the district described in said ordinance and who is making preparations for the erection and maintenance of gas works thereon then it is a constitutional ordinance, and admitting for the sake of argument that appellant herein might have some vested right by reason of a permit from the fire commissioners to erect gas works without said district described in said ordinance or some other constitutional defense that would take it without the operation of it, still that would not render the ordinance unconstitutional or invalid or preclude the city from enforcing it against persons who had no such permit and who had not secured vested rights prior to its enactment. Assum-

ing thefact that prior to the enactment of ordinance No. 7029, a permit had been granted to erect these works and that Mrs. Dobbins had prior to the enactment of said ordinance expended a great amount of money in the erection of said works, would those facts forever preclude the city from enacting an ordinance changing the boundaries of the district as it stood at the time the permit was granted and the money was expended by Mrs. Dobbins? Such would seem to be the contention of appellant. But this contention does not commend itself to us as sound law or good common sense.

Let us illustrate: Suppose John Doe had come to Los Angeles yesterday and purchased a piece of property without the district described in ordinance No. 7029 and this morning begun to erect gas works thereon, could he, on being arrested this afternoon for violating the provisions of said ordinance, come into court and have it declared unconstitutional and invalid because it impaired some vested right Mrs. Dobbins claimed to have by reason of a permit such as appellant sets up? To us it seems plain that he could not. If Mrs. Dobbins herself were threatened with arrest for violating this ordinance, and were to immediately bring an action to restrain the city from enforcing the ordinance, alleging the ordinance to be unconstitutional, would this court, in order to determine the constitutionality of the ordinance, prior to her arrest and trial, take evidence, or permit her to introduce evidence, to ascertain if she had secured a permit to erect said works prior to the enactment of the ordinance, or expended a great amount of money on

said works, prior to said enactment? We apprehend not. We think this court would say to her that those would be matters of defense to be pleaded and proved by her, and that they could not affect the constitutionality or validity of the ordinance. Even if such permit constituted a perfect defense, there is nothing on the face of this ordinance that says it shall apply to any one who has, prior to its enactment, secured a permit to erect gas works outside of the district described in said ordinance. The ordinance is such a one as falls within the police powers of the city to enact, and *there is nothing on the face of it, or in the range of matters of which this court can take judicial cognizance, that would warrant the court in declaring it unconstitutional or invalid.*

In support of our views on this branch of the case we cite the court to the following authorities:

"Many powers exercised by municipalities fall with-
"in what is known as the police power of the state,
"and are delegated to them to be used for the public
"good. Of this nature is the authority to suppress
"nuisances, preserve health, prevent fires, to regulate
"the use and storage of dangerous articles, to establish
"and control markets and the like. * * * Laws
"and ordinances relating to the *comfort, health, con-*
venience, good order and *general welfare of the in-*
"habitants are comprehensively styled police laws or
"regulations."

Dillon on Municipal Corporations, 4 Ed. Sec. 141, vol. I, page 212.

Chancellor Kent, at page 340, Vol. 11 of his Commentaries, in speaking of the extent of police powers, says: "*Unwholesome trades*, slaughter houses, *oper-*

"*ations offensive to the senses,* the deposit the powder, "etc., may all be interdicted by law in the midst of "dense masses of population on the general and ra- "tional principle that every person ought so to use his "property as not to injure his neighbors, and that pri- "vate interests must be made subservient to the gen- "eral interest of the community," which is cited and "approved in Butchers' Union etc. v. Crescent City, "111 U. S. 746, book 28, L. Ed. 585, and Peelsplit "Coal Co. v. West Va., 17 L. R. A. 392."

See same and further definition in

Slaughterhouse cases, 16 Wallace 62; s. c. 21 L. Ed. 404.

Can it, we ask, be doubted that the manufacture of gas is an unwholesome trade and an offense to the senses? If it be an unwholesome trade and offensive to the senses, then, according to Chancellor Kent, it is within the "police power" of the city to regulate it, and even to interdict it.

"Under the general power to pass any other by-laws "for the well-being of the city, its council may by ordi- "nance prohibit saloons, restaurants and other places "of entertainment to be kept open after 10 o'clock at "night. The objection that such a by-law was unrea- "sonable and deprived the citizen of the constitutional "right of acquiring property were not considered to be "well taken. It regulates, but does not deprive the "party of his rights. *Under similar powers an ordi- "nance confining the carrying on of the laundry busi- "ness to a certain portion of the city is a police regu- "lation and reasonable."*

Dillon Mun. Cor. 4 Ed. Vol. I, Sec. 400.

THE CITY OF LOS ANGELES UNDER ITS POLICE POWER WAS AUTHORIZED TO ENACT AND ENFORCE ORDINANCE NO. 7029, IRRESPECTIVE OF THE QUESTION AS TO WHETHER OR NOT GAS WORKS ARE A NUISANCE *PER SE*.

"The legislature under our system has power to "repress whatever is hurtful to the public good and is "generally the exclusive judge of what is or is not hurt-"ful, the only limitations being those prescribed in the "constitution. Subject to those limitations the legisla-"ture has not only the power to regulate but the power "to suppress particular branches of business deemed by "it immoral and prejudicial to the general good. It "seems to be admitted in argument that if slaughter "houses were nuisances *per se*, the order would not be "obnoxious to the constitutional objection now under "consideration. A nuisance *per se* as used in argument, "is a nuisance which the judge can declare to be such "without inquiry into extrinsic facts; that is to say, a "nuisance by enumeration rather than by definition. The "question presented is one of legislative power, and we "are not aware that the limits of that power are to be "determined in any case by the mere vigor of common "law definitions or categories. The legislature can add "to the *mala in se* of the common law the *mala prohibita* "of its own behest. Common law definitions or sched-"ules so far from being limitations upon legislative "power here, are the most familiar subjects of legisla-"tive action. While the general terminology of the law "is very rarely interfered with, nothing is more com-"mon than the enlarging or narrowing by the legisla-"ture of the import of common law terms. Aside from "this the order in question does not find the facts, *nor "does it follow that it proceeds upon the idea that the "slaughtering business would be a nuisance in the full "legal sense, if carried on within the prohibited limits.*

"The power to regulate or prohibit conferred upon the "board of supervisors not only includes nuisances but "extends to everything expedient for the preservation "of the public health and the prevention of contagious "diseases. Now there are many things not coming "up to the full measure of common law or statute nui- "sance, that might both in the light of scientific tests "and of general experience pave the way for the intro- "duction of contagion and its uncontrollable spread "thereafter. Slaughter houses, as ordinarily and per- "haps invariably, conducted in this country, might, "within the limits of reasonable probability, be at- "tended with these consequences. A competent leg- "islative body has passed upon the question of facts "involved and we cannot go behind the findings. So "far as we know on this record the power conferred "has been exercised intelligently and in good faith. * "* * The sovereign power in a community may and "ought to prescribe the manner of exercising individual "rights over property. * * * In England the "power in question has been exercised by the legisla- "tive department of the government, sometimes di- "rectly, but more frequently through the intervention "of municipal corporations, from the highest antiquity. "And in the United States, where legislative power "has ever been subjected to constitutional restraints, "the public judgment has never been so far misguided "as to deny to legislative bodies *a power without which "there would be few social or common rights which in- "dividual caprice or rapacity would be bound to re- "spect.*"

Ex parte Schrader, 33 Cal. 283

The above we quote from the opinion of the court on habeas corpus brought by the petitioner Schrader who had been convicted for the violation of the order of the board of supervisors of the city and county of San Francisco which provided as follows:

"No person shall establish or maintain a slaughter house, etc.," without a certain district described in said

ordinance. The said Schrader claimed in his petition, and also his argument before the court, that the said ordinance was in contravention of his constitutional rights, and that the board of supervisors had no right to pass the ordinance because the slaughter house was not *per se* a nuisance. The same contention is made by appellant here, that the City of Los Angeles has no right to pass such ordinance prohibiting the erection or maintenance of gas works without a certain district of the City of Los Angeles because, they say, that said gas works are not and would not be or constitute a nuisance *per se* if completed, and that the city council has no right or power to suppress or restrict to certain limits the erection and maintenance of anything except such business or buildings as constitute nuisances *per se*. Without admitting that gas works, with their attendant smokes, fumes, noxious odors, coke ovens and the effluvia from their scrubbers and washers would not constitute a nuisance *per se*, still we say that from the decision of this case last above quoted down to and including the decision of the Supreme Court of California in *Ex parte* Lacy, 108 Cal. 326; that court has constantly held that a city could under its police powers delegated to it under Article XI, Section 11 of the constitution of this state, prohibit and restrict within certain districts all unwholesome, noxious, offensive and dangerous trades and businesses.

We now desire to invite the court's particular attention to the case last above mentioned, *Ex parte* Lacy, 108 Cal. 326:

The hearing in the Supreme Court was to secure pe-

titioner's discharge from a judgment of imprisonment of the police court of the City of Los Angeles. The opinion of Justice Garoutte is as follows:

"The petitioner has been convicted and imprisoned "for violating a city ordinance of the City of Los An- "geles, which provides, 'No person or persons shall es- "tablish or conduct any steam shoddy machine, or "steam carpet beating machine, within one hundred "feet of any church, school house, residence, or dwell- "ing house.' He now alleges the judgment void upon "the ground that the ordinance is void, and seeks his "release by a writ of habeas corpus. He claims the "ordinance void upon the ground that it interferes with "certain of his inalienable rights vouchsafed to him by "the Constitution. Upon the part of the city it is "claimed that the passage and enforcement of the or- "dinance is but the exercise of a police power granted "to it in terms by the constitution of the state. The "constitution of the State of California, Article XI, "Section 11, provides: 'Any county, city, town or "township may make and enforce, within its limits, "all such local, police, sanitary, and other regulations "as are not in conflict with general laws.' It will thus "be observed that Los Angeles city is vested with "certain powers by direct grant from the constitution, "and *that grant of power is not confined within narrow "limits, but is broad and far reaching in its scope and "effect. Under this grant of power the city had the "right to pass this ordinance*, unless it is in conflict with "general laws; and we know of no general laws which "conflict with it, unless it can be said to be violative of "those general principles of constitutional liberty which "form the very foundation of both state and federal "constitution. We see nothing in the language of this "ordinance contrary to these great principles of our "government. We see nothing there depriving peti- "tioner of any fundamental rights. In the exercise of "its police and sanitary power the city has attempted "to regulate the business of beating carpets by steam "power. *Under its constitutional grant it had the right "to regulate this business.* The use of steam power of

"itself, within municipal territory, has always been "recognized as the proper subject of regulation; and, "in addition here, it may well be assumed that the dust "and other disagreeable and unhealthy matters aris- "ing in such quantities from the beating of the carpets, "as would naturally be indicated by the use of steam "power, are a constant source of danger and menace "to the good health and general welfare of the neigh- "borhood where located.

"*Conceding the business covered by the provisions "of this ordinance not to constitute a nuisance per se "and to stand upon different grounds from powder fac- "tories, street obstructions and the like, still the case is "made no better for the petitioner. This is not a ques- "tion of nuisance per se, and the power to regulate is "in no way dependent upon such conditions. Indeed, "as to nuisances per se, the general laws of the state are "ample to deal with them. But the business here in- "volved may properly be classed with livery stables, "laundries, soap and glue factories, etc., the class of "business undertakings in the conduct of which the "police and sanitary regulations are made to a greater "or less degree* by every *city in the country. And in "this class of cases it is no defense to the validity of "regulation ordinances to say: 'I am committing no "nuisance, and I insist upon being heard before a court "or jury upon that question of fact.* In this class of "cases a defendant has no such right. To the extent "that it was material in creating a valid ordinance we "must assume that such question was decided by the "municipal authorities and decided against the peti- "tioner and all others similarly situated. * * * *

"This ordinance is not unreasonable or arbitrary nor "discriminating. It treats all persons alike who are en- "gaged in the business named therein. All have the "same rights and all are subject to the same burdens. "It is not unreasonable in the limits of distance fixed. "As to the location of the exact spot distant from a "church or a school house or a dwelling house where "an ordinance would cease to be reasonable it is not "for this court now to say. The limits here prescribed "are those with which we are to deal, and those limi-

"tations of distance may well be said to be reasonable. "We see no substantial objection which can be made "to the validity of this ordinance. Upon the contrary, "the subject matter covered by it is clearly one with "which the city had the constitutional right to deal, "and the businesses there enumerated are unmistak- "ably those which the municipal authorities had the "right to regulate in the interest of the comfort and "good health of the people of the city. The power is "vested in the city by direct grant from the constitu- "tion to control and regulate business undertakings of "the character here involved, and petitioner's constitu- "tional rights have in no way been trespassed upon."

The two cases last cited seem to us to effectually dispose of the appellant's contention herein: That the City of Los Angeles does not have authority to enact an ordinance regulating and restricting a business to a certain limited district unless the business was a nuisance *per se*, and also its contention that it has a right to prove that the business of gas making and storing as it proposes to carry it on would not in effect be a nuisance or cause of annoyance to the neighborhood in which said works are situated.

"The mayor and city council are but trustees of the "public; the tenure of their office impressed their ordi- "public; the term of their office impressed their ordi- "nances with liability to change. They could not, if they "would, pass an irrevocable ordinance. The corpora- "tion cannot abridge its own legislative powers."

State v. Graves, 81 Am. Dec. 639.

"It is true that the right to acquire property may "be regarded as one of those which is inherent in man; "but this right, which took its rise in the law of na- "ture, has received its perfection, and had a perma- "nency given to it by municipal or civil law; and it is "in relation to this law that the right of individuals "to the possession and enjoyment of things must be ex-

"amined. The modifications which legislative power "may make in the possession, use, and distribution of "property are infinite; and nearly every contest which "arises in courts of justice proceeds from the real or "imputed violation of some one of those modifications; "any one of which might be urged to be a violation of "natural law, with as much reason as that of which the "appellant now complains. Our code defines absolute "ownership to be that which gives the right to enjoy "and dispose of one's property in the most unlimited "manner; provided it is not used in a way prohibited "by laws or ordinances. The cases read by the appel- "lant's counsel from the common law books certainly "go to show that an establishment, such as that con- "templated by the parties to this action, at the time "the lease was made, would not be illegal in countries "governed by that jurisprudence. *But the authority of "the city council to make the regulations complained "of cannot be tested by the principles of common law "in relation to nuisances. No such guide is given to "them by the charter. No such limit can be inferred "from the motives which we must suppose induced "such a grant of power; nor from the language by "which it is conferred.* The police of cities require "many regulations which grow out of their situation, "their climates and their populations; and many things "which would not amount to a nuisance at common "law, might be hurtful here."

Milne v. Davidson, 16 A. M. Dec. 189.

"There is no doubt of the general proposition that "a man may do what he will with his own, but this "right is subordinate to another, which finds expres- "sion in the familiar maxim: *Sic utere tuo ut alienum "non laedas.* His right to erect what he pleases upon "his own land *will not justify* him in maintaining a "nuisance or in carrying on a business *or trade that is "offensive to his neighbors.* Ever since Aldreds' case, "Coke Rep. page 57, it has been the settled law, both "of this country and of England, that *a man has no "right to maintain a structure upon his own land, "which by reason of disgusting smells, loud or unusual*

"noises, thick smoke, noxious vapors, the jarring of "machinery, or the unwarrantable collection of flies, "renders the occupancy of adjoining property danger- "ous, intolerable *or even uncomfortable* to its tenants. "* * * *The police power is not subject to any def- "inite limitations, but is co-extensive with the necessi- "ties of the case and the safeguard of public interests."*

Camfield v. U. S. 518.

In the case of Crowley v. Christensen, 137 U. S., page 87, Book 34 L. Ed. 620, Mr. Justice Field says:

"It is undoubtedly true that it is the right of every "citizen of the United States to pursue any lawful trade "or business, under such restrictions as are imposed "upon all persons of the same age, sex, and condition. "But the possession and enjoyment of all rights are "subject to such reasonable conditions as may be "deemed by the governing authority of the country "essential to the safety, health, peace, good order, and "morals of the community. Even liberty itself, the "greatest of all rights, is not unrestricted license to act "according to one's own will. It is only freedom from "restraint under conditions essential to the equal en- "joyment of the same rights by others. It is then lib- "erty regulated by law. The right to acquire, enjoy "and dispose of property is declared in the constitu- "tions of several states to be one of the inalienable "rights of man. But this declaration is not held to "preclude the legislature of any state from passing laws "respecting the acquisition, enjoyment and disposition "of property. What contracts respecting its acquisi- "tion and disposition shall be valid and what void or "voidable; when they shall be in writing and when they "may be made orally, and by what instruments it may "be conveyed or mortgaged, are subjects of constant "legislation. *And as to the enjoyment of property, the "rule is general that it must be accompanied with such "limitations as will not impair the equal enjoyment by "others of their property. Sic utere tuo ut alienum non "laedes is a maxim of universal application.* For the "pursuit of any lawful trade or business, the law im-

"poses similar conditions. Regulations respecting them "are almost infinite, varying with the nature of the "business. *Some occupations, by the noise made in their "pursuit, some by the odors they engender,* and some "by the dangers accompanying them, *require regula-"tions as to the locality in which they shall be con-"ducted.* Some of the dangerous character of the arti-"cles used, manufactured or sold, require, also, special "qualifications in the parties permitted to use, manu-"facture or sell them."

"The ordinance of the city and county of San Fran-"cisco prohibiting the carrying on of public laundries "and wash houses within certain prescribed limits of "the city and county from 10 o'clock at night until 6 "o'clock in the morning, is purely a police regulation, "within the competency of any municipality possessed "of the ordinary powers to make."

(Syllabus) Barbier v. Connolly, 113 U. S. 27.

"The rule is general with reference to the enactment "of all legislative bodies, that the courts cannot in-"quire into the motives of the legislators in passing "them except as they may be disclosed on the face of "the acts or inferable from their operation considered "with reference to the condition of the country and ex-"isting legislation."

Hing v. Cowley, 113 U. S. 703.

We especially commend to the attention of the court the two cases last cited.

"Any business however lawful in itself which as "to those residing in the neighborhood where it is car-"ried on causes annoyances that materially interfere "with the ordinary physical comfort of human exist-"ence, is a nuisance that should be restrained. *Smoke, "noise or bad odors even when not injurious to health "cause a discomfort against which the law will pro-"tect."*

Cleveland *et al.*, v. Gas Light etc., 20 N. J. 201.

"City has right under police powers to establish, "regulate, control and limit markets to certain dis- "tricts, hours, etc."

Dillon Mun. Corp., 4th Ed. Vol. 1, p. 472.

Note to City of Jacksonville v. Ledwith, 23 Am. St. Rep. 581.

Ex parte Byrd, 4 Am. St. Rep. 328.

"The prevention of damage by fire is usually an ob- "ject within the scope of municipal authority, either "by express grant or by the power in a chartered town "or city to make police regulations or needful by-laws. "Under such power it may establish fire limits, pre- "vent the erection of wooden buildings, regulate the "mode and removal of ashes, and make any other rea- "sonable regulation to prevent and extinguish fires."

Dillon on Mun. Corporations, 4 Ed Vol. 1, Sec. 143, page 216.

Why cannot the legislature prevent not only wooden buildings but gas works much more dangerous?

"There can be no question as to the propriety of "superintending and regulating the erection and altera- "tion of buildings in the city, so far as to see that they "conform to the regulations for preventing fire. This "is demanded for the safety and welfare of the public "at large, and especially of residents and property hold- "ers in the city. This duty is imposed upon the fire "marshal. In order that he may discharge it thor- "oughly and systematically, it is essential that he should "know what buildings are to be built or altered and "by whom, the mode of construction, the materials to "be used, the location and dimensions of the buildings "when complete, *and the purpose for which they are "to be used.*"

Welch v. Hotchkiss, 12 Am. Rep. 385.

"A power conferred upon a city to regulate the erec- "tion, use and continuance of slaughter houses within

"the city, *includes the power of total prohibition in cer-*
"tain specified limits."

Cronin v. People (N. Y.) 37 Am. Rep. 564.
Milwaukee v. Gross, 91 Am. Dec. 472.

Mr. Tiedeman in his work on "Police Powers," volume 2, at page 740, says:

"Where therefore certain trades and employments "which serve some useful purpose and adds something "to the world's wealth are harmful to the inhabitants "of the locality in which they may be conducted; and "the harm may be avoided altogether or considerably "reduced by confining them to localities in which the "population is sparse and the residences are few; it is "altogether permissible to prohibit the prosecution of "these trades in other localities. The instances of this "kind of regulation are very numerous. Slaughter "houses have been confined to certain localities, the "sale of fresh meat *and vegetables* has been prohibited "except in public markets, where the articles ex-"posed for sale may be conveniently inspected. In the "same way may the *manufacture of pressed hay*, the *"maintenance of dairies*, the cultivation of land within "the limits of a town, *and the storage of cotton and "other combustible material*, such as *oil* and gun pow-"der, be prohibited in densely settled parts of the city, *"and the prosecution of such trades* be confined to cer-"tain less dangerous localities."

Now to us it seems plain that if a city has the right under the exercise of its "police power" to confine "the sale of vegetables," the "manufacture of pressed hay," the "maintenance of dairies," the "storage of cotton and oil" and "such trades" to definite localities, that it certainly has equally as good right under the exercise of its said "police power" to confine the manufacture and storage of gas to within a definite locality. For there can be no doubt that the manufacture and stor-

age of gas is vastly more dangerous to life and property and a greater menace to the *health and comfort* of the neighborhood wherein it is carried on than any of the occupations enumerated by Mr. Tiedeman in his work as above quoted. Certainly it can not be successfully claimed that the manufacture of pressed hay is any more dangerous to *health* or *comfort* than the manufacture of gas, nor can it be said that the storage of oil is any more dangerous than the storage of gas. We would infinitely prefer to reside in the neighborhood of a fresh vegetable market, or a meat market than to reside in the neighborhood of a gas works.

"An ordinance of the city of Sacramento prohibiting "the slaughtering of animals or the maintenance of "slaughter houses within the city is valid."

(*Syllabus*) *Ex parte* Heilborn, 65 Cal. 609.

We believe that in the light of the foregoing authorities it is clear that the city has the right under the "police power" granted to it by Art. XI, Sec. 11, of the Constitution of the State of California, to regulate the business of manufacturing and storing gas within its limits and even in the absence of the grant from the constitution we think it is beyond question that the power delegated to the city by the legislature through the general laws of the state, and the provisions of its charter that we have quoted in plenary to enable it to enact the said ordinance No. 7029. The ordinance in question does nothing more than to restrict the erection and maintenance of gas works to a certain district within the said city, and such a restriction is nothing more than a simple and necessary regulation of the bus-

iness of manufacturing and storing of gas, *a business which by reason of the noxious, offensive and poisinous odors, vapors and smoke, necessarily and invariably attendant upon the manufacture of gas and by reason of the inflammability, combustibility and explosive nature of the gas thus manufactured and stored, is a constant menace to the safety, health and comfort of all people in the neighborhood.*

We submit to the court that if this ordinance is not valid and constitutional, then there is no ordinance that the city could pass to restrict the manufacture and storage of gas to any certain district within its territory.

If this ordinance is unconstitutional, how, we ask this honorable court, could the City of Los Angeles frame and word an ordinance to restrict the manufacture and storage of gas to a certain portion of its territory that would be valid and constitutional?

Will it do to say that the city cannot so restrict the business of manufacturing and storing of gas? Will it do to say that the city has no power to prevent the erection of a gas works in the most populous and desirable residence portion of the city or on the most frequented business corner in the city?

This is the contention of counsel for appellant when narrowed down. We have an abiding faith that such is not the law.

We think the foregoing authorities establish the fact that the city had full power to enact the ordinance and that it is not invalid nor unconstitutional.

THE COURT IN DETERMINING THE VALIDITY OF THIS ORDINANCE CAN TAKE INTO CONSIDERATION ONLY THE *FACE OF THE ORDINANCE* AND SUCH FACTS AS THE COURT TAKES JUDICIAL COGNIZANCE OF.

The Supreme Court of the United States, in a case involving the questions involved here, Powell v. Commonwealth of Pennsylvania, 127 U. S., 678, Book 32, Law Ed., page 253, rendered the following decision:

"This writ of error brings up for review a judg-
"ment of the Supreme Court of Pennsylvania, sustain-
"ing the validity of a statute of that commonwealth re-
"lating to manufacture and sale of what is com-
"monly called oleomargarine butter. That judgment,
"the plaintiff in error contends, denies to him certain
"rights and privileges specially claimed under the
"Fourteenth Amendment to the Constitution of the
"United States. * * * * * * * * * *

"The plaintiff in error was indicted, under the last
"statute, in the Court of Quarter Sessions of the Peace
"of Dauphin County, Pennsylvania. The charge in
"the first count of the indictment is that he unlawfully
"sold, 'as an article of food,' two cases, containing five
"pounds each, of an article designed to take the place
"of butter produced from pure unadulterated milk or
"cream from milk, the said article so sold, as afore-
"said, being an article manufactured out of certain
"oleaginous substances and compounds of the same
"other than that produced from unadulterated milk or
"cream, and said article so sold, as aforesaid, being an
"imitation butter.' In the second count the charge is
"that he unlawfully had in his possession, 'with intent
"to sell the same, as an article of food, a quantity, viz.,
"one hundred pounds, of imitation butter, designed to
"take the place of butter produced from pure, unadul-
"terated milk or cream from the same, manufactured
"out of certain oleaginous substances, or compounds of
"the same other than that produced from milk or cream
"from the same.'

"It was agreed for the purposes of the trial, that "the defendant, on July 10, 1885, in the City of Har- "risburg, sold to the prosecuting witness, as an article "of food, two original packages of the kind described "in the first count; that such packages were sold and "bought as butterine, and not as butter produced from "pure, unadulterated milk or cream from unadulterated "milk; and that each of said packages was, at the time "of sale, marked with the words, 'Oleomargarine But- "ter,' upon the lid and side in a straight line, in Roman "letters half an inch long. It was also agreed that the "defendant had in his possession one hundred pounds "of the same article, with intent to sell it as an article "of food."

"This was the case made by the Commonwealth.

* * * * * * * * *

"It is immaterial to inquire whether the acts with "which the defendant is charged were authorized by "the statute of May 22, 1878, or by that of May 24, "1883. The present prosecution is founded upon the "statute of May 21, 1885; and if that statute be not in "conflict with the Constitution of the United States, "the judgment of the Supreme Court of Pennsylvania "must be affirmed.

"It is contended that the last statute is void in that "it deprives all coming within its provisions of rights "of liberty and property without due process of law, "and denies to them the equal protection of the laws; "rights which are secured by the Fourteenth Amend- "ment of the Constitution of the United States.

"It is scarcely necessary to say that if this statute "is a legitimate exercise of the police power of the state "for the protection of the health of the people, and for "the prevention of fraud, it is not inconsistent with that "amendment; for it is the settled doctrine of this court "that, as government is organized for the purpose, "among others, of preserving the public health and the "public morals, it cannot divest itself of the power to "provide for those objects; and that the Fourteenth "Amendment was not designed to interfere with the "execution of that power by the states." [*Mugler v. "Kansas*, 123 *U. S.*, 663 (31:211.) *Butchers' Union, "S. H. & L. S. L. Co. v. Crescent City, L. S. & S. H.*

"Co., 111 U. S., 746, 751 (28:585, 587.) Barbier v. "Connolly, 113 U. S., 27 (28:923.) Yick Wo. v. Hop- "kins, 118 U. S., 356 (30:220).]

* * * * * * * * *

"Whether the manufacture of oleomargarine, or im- "itation butter, of the kind described in the statute, "is, or may be, conducted in such a way, or with such "skill and secrecy, as to baffle ordinary inspection, or "whether it involves such danger to the public health "as to require, for the protection of the people, the "entire suppression of the business, rather than its regu- "lation in such manner as to permit the manufacture "and sale of articles of that class that do not contain "noxious ingredients, are questions of fact and of "public policy, which belong to the legislative depart- "ment to determine. *And it does not appear from the "face of the statute, or from any facts of which the "court must take judicial cognizance, that it infringes "rights secured by the fundamental law, the legisla- "tive determination of those questions is conclusive "upon the courts. It is not a part of their functions to "conduct investigations of facts* entering into ques- "tions of public policy merely, and to sustain or frus- "trate the legislative will, embodied in statutes, as "they may happen to approve or disapprove its deter- "mination of such questions. *The power which the "legislature has to promote the general welfare is very "great, and the discretion which that department of the "government has, in the employment of means to that "end, is very large.* While both its power and its "discretion must be so exercised as not to impair the "fundamental rights of life, liberty and property, and "while, according to the principles upon which our in- "stitutions rest, 'the very idea that one man may be "compelled to hold his life, or the means of living, or "any material right essential to the enjoyment of life, "at the mere will of another, seems to be intolerable "in any country where freedom prevails, as being the "essence of slavery itself,' yet, 'in many cases of mere "administration, the responsibility is purely political, "no appeal lying except to the ultimate tribunal of the "public judgment, exercised either in the pressure of

"public opinion or by means of the suffrage.'" [*Yick "Wo. v. Hopkins*, 118 *U. S.*, 370 (30:226.)]

"The case before us belongs to the latter class. The "legislature of Pennsylvania, upon the fullest investi- "gation, *as we must conclusively presume,* and upon "reasonable grounds, as must be assumed from the rec- "ord, has determined that the prohibition of the sale, "or offering for sale, or having in possession to sell, "for purposes of food, of any article manufactured out "of oleaginous substances or compounds other than "those produced from unadulterated milk or cream "from unadulterated milk, to take the place of butter "produced from unadulterated milk or cream from "unadulterated milk, will promote the public health, and "prevent frauds in the sale of such article. If all that "can be said of this legislation is that it is unwise, or "unnecessarily oppresive to those manufacturing or "selling wholesome oleomargarine, as an article of food, *"their appeal must be to the legislature, or to the "ballot-box, not to the judiciary.* The latter cannot "interfere without usurping powers committed to an- "other department of government. It is argued, in be- "half of the defendant, that if the statute in question "is sustained as a valid exercise of legislative power, "then nothing stands in the way of the destruction by "the legislative department of the constitutional guar- "antees of liberty and property. But the possibility of "the abuse of legislative power does not disprove its "existence. That possibility exists even in reference to "powers that are conceded to exist. Besides, the ju- "diciary department is bound not to give effect to statu- "tory enactments that are plainly forbidden by the Con- "stitution. This duty, the court has said, is always "one of extreme delicacy; for, apart from the necessity "of avoiding conflicts between co-ordinate branches of "the government, whether state or national, it is often "difficult to determine whether such enactments are "within the powers granted to or possessed by the "legislature. Nevertheless, if the incompatibility of "the Constitution and the statute is clear or palpable, "the courts must give effect to the former. And such "would be the duty of the court if the state legisla-

"ture, under the pretense of guarding the public health, "the public morals, or the public safety, should invade "the rights of life, liberty or property, or other rights, "secured by the supreme law of the land.

"The objection that the statute is repugnant to the "clause of the Fourteenth Amendment forbidding de- "nial by the state to any person within its jurisdiction "of the equal protection of the laws is untenable. The "statute places under the same restrictions, and sub- "jects to like penalties and burdens, all who manufac- "ture, or sell, or offer for sale, or keep in possession to "sell, the articles embraced by its prohibitions; thus rec- "ognizing and preserving the principle of equality "among those engaged in the same business. [*Bar- "bier v. Connolly*, 113 *U. S.*, 27 (28:923.) *Soon Hing "v. Crowley, Id.* 703 (28:1145.) *Missouri Pac. R. Co. "v. Humes*, 115 *U. S.*, 519 (29-465.)]

"It is also contended that the act of May 21, 1885, "is in conflict with the Fourteenth Amendment in that "it deprives the defendant of his property without that "compensation required by law. This contention is "without merit, as was held in *Mugler v. Kansas.*"

Powell v. Commonwealth of Pa , 127 U. S. 678.

We have thus far in dealing with the question of the validity or invalidity of this ordinance, been taking into consideration only the face of the ordinance, together with the facts of which the court takes judicial cognizance, such as "the size of the city, the density of its population, the danger attending the manufacture and storage of gas, etc., etc. And we think that the authorities heretofore cited fully bear us out in our contention that there is nothing appearing on the face of the ordinance or in the facts of which the court takes judicial cognizance that renders said ordinance invalid or unconstitutional.

We come now to a discussion of certain other facts which appellant has alleged in his bill in equity and

which its counsel claim render the ordinance invalid, such as the allegations:

1st—That Mrs. Dobbins, for whom appellant was erecting said gas works, had, prior to the enactment of ordinance No. 7029, obtained a permit from the Board of Fire Commissioners of Los Angeles City to erect said gas works.

2nd—That Mrs. Dobbins, by reason of having purchased certain property for the purpose of erecting gas works, and having obtained a permit from the Board of Fire Commissioners of Los Angeles to build such gas works, and having entered into contracts with various parties for the building of the same, all done prior to the enactment of said ordinance, became vested with certain interests in property and rights in contracts which are impaired by this ordinance.

3d—That appellant, by reason of having entered into a contract with the Valley Gas and Fuel Company prior to the enactment of the ordinance, became vested with certain rights which are impaired by the ordinance.

4th—That the ordinance is unreasonable; and

5th—That the members of the Common Council of the City of Los Angeles were actuated by bad motives in the adoption of said ordinance.

But before we proceed to the discussion of this branch of the case we desire to call the court's attention to the fact that it is the duty of the court to uphold the validity and constitutionality of this ordinance if legally possible.

"For our purposes we must assume that if a state of "facts could exist that would justify such legislation it "actually did exist when the statute now under consid-

"eration was passed. For us the question is one of "power, not of expediency. *If no state of circum-"stances could exist to justify such a statute then we "may declare this one void because in excess of the "legislative power of the state, but if it could we must "presume it did.*

"Of the propriety of legislative interference within "the scope of the legislative power, the legislature is "the exclusive judge."

Munn v. Illinois, 94 U. S. 113.

Peel Split Coal Co. v. W. Va., 17 L. R. A. 389.

And so we say in this case that if any state of facts can exist that would make the manufacture and storage of gas, noxious and offensive or a menace to the health, *safety or comfort* of the neighborhood in which it is manufactured and stored then the court must assume that such a state of facts does exist, *if the court can conceive of no state of facts* that would make the manufacture and storage of gas noxious or offensive or dangerous to the health, *comfort or safety* of a thickly populated neighborhood, then and only then would this court be justified in declaring this statute void. For you to have been in the neighborhood of a gas works while in operation would be worth to us more than all the argument we can present.

We will now resume our argument with reference to the foregoing allegations of appellant's bill, which counsel claim render this ordinance invalid. First, we will take up the question as to the effect of the permit which is alleged to have been granted to Mrs. Dobbins by the Board of Fire Commissioners.

It is the contention of appellant's counsel that by reason of the fact that the Board of Fire Commission-

ers, prior to the enactment of this ordinance, granted Mrs. Dobbins a permit to erect these gas works on lots 16, 17 and 18 in block 2 of Pomeroy & Mills sub. of the Hollenbeck Tract, that the city parted with whatever authority or right it ever had to forbid the erection of gas works upon said premises.

The bill of appellant in the Circuit Court does not disclose what authority the Board of Fire Commissioners had to grant a permit to erect gas works in the City of Los Angeles, if indeed it had any; in fact, the said bill does not allege that a permit was granted, nor does it contain any copy of what it purports was a permit. It only alleges that a majority of the members of said Board of Fire Commissioners, upon a motion made by one of its members to grant Mrs. Dobbins a permit, voted in the affirmative, and that one of the members of said board voting in the affirmative immediately gave notice that at the next meeting of the board he would move to reconsider the question, and that at the next meeting of the board this member did move to reconsider the question and the motion was lost by a majority vote. As to whether or not the permit was granted, the bill does not otherwise disclose. Can this court determine, therefore, that the permit ever was issued, or that the board had authority to issue it? The court will take judicial cognizance that the council is the legislative body of the city. But, let us suppose both that the Board of Fire Commissioners had the authority to grant such a permit and that it did grant it to Mrs. Dobbins; we contend that it would not constitute a contract between the City

of Los Angeles and Mrs. Dobbins. We contend that at most it would only restore to Mrs. Dobbins that right which had previously been taken away from her. When, if ever, it did so is not disclosed by the bill; but if this right had not previously been taken from her there was no need of the permit. So that in granting her the permit, it would be only restoring to her that which had been taken away from her, or, in other words, restoring her to the *status quo* of a person from whom the right had never been taken, and she would be in no better position and have no superior rights to a person who owned property in the district prior to any legislation by the city upon the subject. And so we contend that her alleged vested rights and alleged contractual rights under this purported permit are in no way more sacred or superior to the rights of any person who owned property in this district prior to any legislation by the city on this subject. And we further contend that the enforcement of this ordinance against Mrs. Dobbins would deprive her of no rights, that a person who began the erection of a gas building in said district prior to any legislation by the city on this subject, would have been deprived of by this ordinance. Nor does it affect any right she has differently from what it would the rights of such a person.

But, assuming for the sake of this argument that the permit was in its nature a contract (which we claim it was not), and that by relying upon and spending money in beginning the erection of gas works under it, she secured vested rights, still we contend that these vested rights, like all vested rights, and the ob-

ligations of this assumed contract like the obligations of all contracts, must yield to the enactment and enforcement of laws and ordinances under the police powers of states and municipalities; that there are no private vested rights or contractual relations between individuals that are so sacred but that they must yield to the enactment and enforcement of laws made for the benefit of society under and by virtue of the police powers inherent in the state and delegated by it in this instance to the city. If this were not so, the rights of the individual would be superior to the rights of society, and the unit would be greater than the whole.

A MUNICIPALITY CANNOT GIVE, GRANT, BARTER AWAY OR PART WITH ITS RIGHT TO EXERCISE THE POLICE POWER DELEGATED TO IT BY THE STATE.

Mr. Cooley in his work on Constitutional Limitations, 6 Ed., at page 341, says:

"It would seem, therefore, to be the prevailing opin-
"ion, and one based upon sound reason, that *the state*
"cannot barter away, or in any manner abridge or
"weaken, any of those essential powers which are in-
"herent in all governments, and the existence of which
"in full vigor is important to the well-being of organ-
"ized society; and that any contracts to that end are
"void, upon general principles, and cannot be saved
"from invalidity by the provision of the national Con-
"stitution, now under consideration."

"The general principle is that it is not within the
"power of a common council to bind its legislative ca-

"pacities by any arrangement or stipulation so as to "disable itself from enacting any laws that *might be* "*deemed* essential for public good."

Russell on Police Powers, page 88.

In Davenport v. City of Richmond, 59 Am. Rep., 694, s. c. 81, Va. 636, was a case where a conviction of the violation of an ordinance forbidding the keeping of powder had been had. The city council had conveyed to defendant's grantors the premises in question, near the outskirts of the city, to be used by them as a powder magazine, subject to such regulations relative to the storage, receipt, delivery and transportation of powder as the council may prescribe. A subsequent ordinance declared the said magazines dangerous to life and property and directed them to be removed at the expense of the owners, to some more remote locality.

Davenport claimed that the ordinance was invalid and unconstitutional because it divested him of vested rights and impaired the obligation of the contract entered into between the city and himself and his grantors. The court, in rendering its decision, says:

"It is contended that the ordinance complained of "is unconstitutional and void; first, because it impairs "vested rights of the defendants under a previous valid "contract with the city council; and second, because "it takes the property of the defendant without com-"pensation.

"Upon the principles recognized by this court in R. "F. and R. R. Co. v. City of Richmond, 26 Gratt., 83, "*we are of opinion that this position is not well taken.* "In other words, that the withdrawal of the privilege "previously granted to the defendants—to erect and "maintain a powder magazine within the city limits— "was a valid exercise of the police power with which,

"to that extent, the city is invested by the legislature, "and with reference to which the privilege was granted "and accepted. And hence the inconvenience of which "the defendants complain is *damnum absque injuria.*

"However difficult it may be, if it is possible at all, "to exactly define the limits of that power, there is no "doubt that it extends to the protection of the lives, "health, morals and safety of all persons in the com- "munity, *and that it cannot, by contract or otherwise, "be parted with by a municipal corporation to which it "may be delegated.* * * * * * * * *

"It is sufficient to say that the storage of gun-pow- "der in a city or town, being attended with danger, "its regulation is a matter within the power of cor- "porate authorities, and consequently the judgment of "the city council as expressed in the ordinance requir- "ing the removal of the magazines in question, is con- "clusive upon the courts.

"The Haustings court, therefore, did not err in in- "structing the jury that 'the fact that the city of Rich- "mond in 1866 *sold to the defendants, or to those un- "der whom they claim title, the site of the powder "magazines now ordered by the council to be removed "for the purpose or with the knowledge that the same "was to be used for the erection of powder magazines, "does not prevent the city council from passing the "ordinance of August* 17, 1882, *if, in the judgment of "that body the safety or convenience of the people de- "mands the removal of said magazines.' "*

In the case of Newson v. City of Galveston, 13 S. W. Rep., 368, the facts were as follows: In October, 1884, the plaintiff Newson made application in writing to the city council for permission to establish under the ordinance of 1880, which was then in force, a private market, in the city of Galveston, for the sale of fresh meats. This application was granted by the council, and immediately thereafter the plaintiff established on Twenty-first street, in said city, a private market for

the sale of fresh meats, fitting up the same at an expense to himself of several thousand dollars, and continued unmolested to conduct such market at a profit from that time until January 1, 1889, paying to the proper officer quarterly in advance the tax imposed by that ordinance for the exercise of such privilege. In October, 1888, the City Council passed another ordinance amending the ordinance of 1880, and making it unlawful to conduct a private market in the district where plaintiff's market was situated, and where he had been granted a permit by the city five years before to erect it. In January, 1889, plaintiff was arrested for carrying on a private market on his aforesaid premises in violation of the ordinance passed five years after he had erected his market. The contention was that the ordinance impaired his vested rights and the obligation of his contract with the city, and was in conflict with the Constitution of the United States. The court says in its opinion with reference to this contention as follows:

"*Police powers possessed by such (municipal) cor-*
"*porations cannot be fettered by contracts, but must be*
"*left free to be exercised at all times whether in confer-*
"*ring or withdrawing privileges once conferred.* If li-
"cense tax had been paid for a year, this would not de-
"prive the city of the power to withdraw the privilege
"before its expiration if the public welfare demanded it.
"Much less would the fact that the city for a time had
"received the tax and granted the privilege make it in-
"cumbent on it to continue to do so. *If appellant ex-*
"*pended money in preparing his private market place*
"*for the conduct of his business, he did so with the full*
"*knowledge that the city might at any time forbid the*
"*business (market) to be there conducted.*"

The foregoing case we regard as being a parallel case with the one now under consideration, and the facts therein were even more favorable to the plaintiff Newson than they are to the appeliant herein. And we believe that the principles of the law declared in that case apply to the purported facts of this case.

"The legislature of a state *cannot by any contract* "limit the exercise of the police power of the state to "the prejudice of the general welfare in regard to pub- "lic health."

Butchers' Union, etc., v. Crescent City, etc., 111 U. S. 746.

We desire to call the court's attention to the case of Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659; s. c. 24 L. Ed. 1036, and commend it to careful reading, as we regard it as one of the most important cases in all the reports on the question involved here. It is too long to be quoted. *In that case it was held that a grant by the state of Illinois to a private corporation of a right or privilege to manufacture fertilizers in a certain territory could be abrogated and destroyed by an ordinance of the village of Hyde Park, to which general "Police Powers" had been subsequently delegated by the state,* and that the Fertilizing Company could be thus compelled to abandon its works, which it had erected and established at a cost of more than $200,000, although when the establishment was erected it was in swampy ground remote from buildings and the village of Hyde Park had grown up around it afterwards. The court held that the ordinance of the village was not such impairment of the obligation of the charter-contract between the company

and the state, or impairment of the vested rights of the company as is forbidden by the constitution of the United States. The facts in favor of the Fertilizer Company in that case were much stronger than those in favor of appellant herein and the loss sustained by said company much greater than that sustained by appellant or Mrs. Dobbins herein.

We submit that the foregoing authorities fully sustain our contention that the city of Los Angeles could not by the act of its Board of Fire Commissioners part with its right to regulate and prohibit the erection of gas works within its boundaries, or barter away its right (which is also its duty) to protect the health, safety and comfort of its citizens.

ALL INTERESTS IN PROPERTY AND RIGHTS IN CONTRACTS WHETHER *VESTED* OR NOT ARE ACQUIRED AND HELD BY INDIVIDUALS AND CORPORATIONS SUBJECT TO THE RIGHT OF THE STATE AND MUNICIPALITY TO EXCRCISE THEIR *"POLICE POWER"* FOR THE PROTECTION OF THE LIVES, HEALTH, SAFETY AND COMFORT OF THEIR CITIZENS.

Mr. Cooley, in his work on Constitutional Limitations, 6 Ed., at page 707, in discussing "the police power of the states," and especially with reference to the "impairment of the obligations of contracts" in the exercise of the said "police power," says:

"*Obligation of Contracts*—The occasion to consider "this subject in its bearing upon the clause of the Con- "stitution of the United States which forbids the states "passing any laws impairing the obligation of contracts "have been frequent and varied; and it has been held "without dissent that this clause does not so far remove "from state control the rights and properties which de- "pend for their existence or enforcement upon con- "tracts, as to relieve them from the operation of such "general regulations for the good government of the "state and the protection of the rights of individuals as "may be deemed important.

"*All contracts and all rights, it is declared, are sub- "ject to this power; and not only may regulations "which affect them be established by the state, but "all such regulations must be subject to change from "time to time, as the general well-being of the com- "munity may require, or as the circumstances may "change, or as experience may demonstrate the ne- "cessity.*

"Perhaps the most striking illustrations of the prin- "ciple here stated will be found among the judicial de- "cisions, which have held that the rights insured to "private corporations by their charters, and the manner "of their exercise, are subject to such new regulations "as from time to time may be made by the state with "a view to the public protection, health and safety, and "in order to guard properly the rights of other individ- "uals and corporations. Although these charters are to "be regarded as contracts, and the rights assured by "them are inviolable, it does not follow that these rights "are at once, by force of the charter contract, removed "from the sphere of state legislation, and that the char- "ter implies an undertaking, on the part of the state, "that in the same way in which their exercise is per- "missible at first, and under the regulations then exist- "ing and those only, may the corporators continue to "exercise their rights, while the artificial existence con- "tinues.

"The obligation of the contract by no means ex- "tends so far; but, on the contrary, the rights and priv- "ileges which come into existence under it are placed "upon the same footing with other legal rights and

"privileges of the citizen, and subject in like manner "to proper rules for their due regulation, protection "and enjoyment."

In the well considered case of Mugler v. Kansas, 123 U. S. 669; s. c. 31 L. Ed. 205, where it was contended that a law of Kansas enacted under and by virtue of the "police powers" inherent in the state, was invalid because it impaired vested rights and was therefore in conflict with the Fourteenth Amendment of the Constitution of the United States, Mr. Justice Harlan, who rendered the opinion, says:

"It cannot be supposed that the states intended "by adopting that amendment (the 14th), to impose "restraints upon the exercise of their powers for the "protection of the *safety, health* or morals of the com- "munity. * * * The principle that no person "shall be deprived of life, liberty or property without "due process of law, was embodied, in substance, in "the constitution of nearly all, if not all, of the states "at the time of the adoption of the Fourteenth Amend- "ment; *and it has never been regarded as incompatible "with the principle,*—equally vital because essential to "the peace and safety of society,—*that all property in "this country is held under the implied obligation that "the owner's use of it shall not be injurious to the com- "munity.* * * *

"A prohibition simply upon the use of property for "purposes that are declared by valid legislation to be "injurious to the health, morals and safety of the com- "munity, cannot in any just sense be deemed a taking "or an appropriation of property for the public benefit. "Such legislation does not disturb the owner in the con- "trol or use of his property for lawful purposes, nor "restrict his right to dispose of it, but is only a declara- "tion by the state that its use by any one for certain for- "bidden purposes is prejudicial to the public interests."

Mugler v. Kansas, 123 U. S. 669.

"It may be said in general terms independently of "any positive enactment that *it is the right of society "in the midst of a populous settlement to be exempt "from proximity of dangerous and noxious trades,* and "that it is the duty of owners of real estate in the "midst of many habitations *to abstain from erecting "buildings thereon,* or otherwise using it for carrying "on a *business dangerous to the lives, health or com-"fort* of the inhabitants of such dwellings, *although a "trade in itself useful or beneficial to the public.* But "such general duty and obligation not being fixed by "rule precise enough for judicial purposes, we think "it is competent for the legislature to interpose and by "a special enactment to declare what shall be deemed "a dangerous or noxious trade, under what circum-"stances and within what distances of habitations it "may or shall not be set up, how the use of it shall be "regulated, and to prohibit any other than such regu-"lated use by specific remedies."

Com. v. Alger, 7 Cush. 96.

The case of the Corporation of Knoxville v. Bird, 12 B. J., Lea, 121, we consider parallel with the present case and in point. The facts were as follows:

On the 11th day of February, 1882, the owner of a lot on Asylum street, in the city of Knoxville, leased to the defendant the lot in question for three years, with an agreement that a livery stable was to be erected thereon, the dimensions and character of which were stipulated for in the contract. The lessees, *in pursuance of this agreement,* had contracted for the building to be erected, had procured the lumber to be placed on the ground and begun to fashion it for the erection of the building—*having prepared the brick pillars on which it was to stand.* The building itself was to be of wood.

After the building had progressed thus far in its

course of erection, the city passed an ordinance making its erection in the district where it was situated unlawful.

Defendant was arrested and convicted for a violation of the ordinance. His contention was that the ordinance was unconstitutional because it impaired the obligation of his contracts with the builders and the lessor and had also impaired his vested right, etc., etc.

The court, in rendering its opinion, says:

"The argument is earnestly pressed upon us that "the ordinane is void as impairing the obligation of "the contract with the owner, to build, or with the "workmen who had contracted to erect the building.

"We take it there is nothing in this objection. The "principle applied to this aspect of the case is thus "stated by Mr. Parsons: 'If one agrees to do a thing "which is lawful for him to do, and it becomes unlaw-"ful by an act of the legislature, the act avoids the "promise, and so if one agrees not to do that which he "may lawfully abstain from doing, but a subsequent act "requires him to do it, this act also avoids the prom-"ise.' [*Parsons on Contracts, Vol. 2, page 674.*]

"As a matter of course, the power of the legisla-"ture must be exercised in subservance to the Consti-"tution, and in accordance with it. It is prohibited to "pass any law impairing the obligation or element of "legal compulsion in contracts, and this prohibition is "imperative in all the field of pure contract obligations, "which, when complete and lawful at the time, are be-"yond the reach of the legislative action.

"But the principle upon which the doctrine of non-"impairment of contracts stands is, that the law for its "enforcement and execution existing at the time makes "a part of the contract, so enters into it as to become "a part of it and therefore stands protected by the con-"stitutional inhibition.

"By this principle the contract in this case must be "held to have been entered into in view of the right on "the part of the city to exercise its police powers for

"the benefit of all its citizens, and so this legal and con-
"stitutional right in its proper exercise, entered into
"the contract of the parties, or rather, it was made in
"subservance to the exercise of the granted favor found
"in the charter, as the law of its creation. The prop-
"erty was in the city, the contract to be executed in
"the city, and as a matter of course subject to the exer-
"cise of all the rightful powers of the city govern-
"ment, charged with the protection and guardianship of
"the property of the people within its limits.

"This being so, the only question is, was the ordi-
"nance in question an exercise of the lawful powers of
"the mayor and aldermen, or was it for any cause
"void and inoperative. Its incidental effect in pre-
"venting the completion of the contract of building can-
"not be considered.

"It is true the exercise of this power by the city au-
"thorities tends in a considerable degree to impinge up-
"on and restrain the free use of the property of parties
"living within the prescribed limits, the highest idea
"of property being that over which man has complete
"dominion with which he may do as he pleases. But
"it is an essential element of every organized society
"that even this right is to be enjoyed in subordination
"to the general public interest of the whole body. For
"the benefits conferred by the protection given by law,
"and the general advantages received from organized
"society, this entire freedom is subject to be abridged
"and regulated within certain bounds, only limited by
"the requirements that private property shall not be
"taken or appropriated for public use without compen-
"sation being first made for the property thus used.
"The defendant in this case has only been required to
"submit his rights to the rule that a man must enjoy
"them subject to such regulation as to the interest of
"the society of which he is a member may demand."

"A city ordinance passed under the statutes of 1872,
"C. 243, and providing that a wooden building shall
"not be built within a certain distance of another
"wooden building, applies to such a building erected
"after the ordinance took effect, *although before the*
"passage work was begun upon the cellar upon the site
"of the proposed building, a contract was made for its

"erection, and lumber had been bought and prepared in "accordance with the contract."

(***Syllabus***) ***City of Salem v. Maynes, 123 Mass. 372.***

Three other well considered cases to like effect as the last case cited are the cases of People v. Hawley, 3 Mich., 330; Davenport v. City of Richmond, 81 Va. 636, hereinbefore cited, and Newson v. City of Galveston, 13 S. W. 368, hereinbefore cited.

"An act of the legislature provided there should not "be any private market kept within 12 squares of a pub- "lic market in the city of New Orleans.

"Held, not unconstitutional either as taking away "the property of those keeping private markets at the "time of the passage of the act within the prescribed "limits or as taking away the vested rights of those "holding licenses to keep such markets."

City of New Orleans v. Stafford, 21 Am. Rep. 563

"All property and vested rights of individuals are "subject to such regulations of police as the legislature "may establish with a view to protect the community "and its several members against such use or employ- "ment thereof as would be injurious to society or un- "just toward other individuals."

2 Story Constitution, Sec. 1954.

"The Fourteenth Amendment of the U. S. Consti- "tution is not designed to interfere with the power of "the state sometimes termed its 'police power,' to pre- "scribe regulations to promote the health, peace, morals, "education and good order of the people."

Barbier v. Connolly, 113 U. S. 27.

"It is usual and proper where a building or works "are being erected that can only be used for a purpose "that is unlawful *to restrain the erection.* The works, "if erected, might tempt the owner to use them, and "it seems like trifling to permit any one to go on with a "building which he can never be permitted to use."

Cleveland v. Citizens' Gas Light Co., 20 N. J. Equity Reports, 206.

So in this case at bar the gas works that are being erected without the limit prescribed by the ordinance of March 3rd, 1902, can only be used and maintained for a purpose which under the said ordinance is declared to be unlawful, and therefore if the erection of them could be restrained by injunction they certainly can be forbidden and prohibited by an ordinance of the municipal legislature. The reasoning that would apply in the case of the court restraining them would apply with even greater force in the case of a municipal ordinance legislating against the erection of such buildings.

The cases of Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659; Camfield v. U. S., 167 U. S. 518; Book 42, Law Ed. 261; Crowley v. Christensen, 137 U. S. 87, Law Ed., Book 34, page 620; Barbier v. Connolly, 113 U. S. 27 (all cited hereinbefore) fully sustain us in our contention that all interests in property and rights in contracts, whether *vested* or not, are acquired and held by individuals and corporations subject to the right of states and municipalities to exercise their police powers at all times.

We think that a consideration of the above authorities will make it plain to the court that ordinance No. 7029 is not such an impairment of the obligation of

any contract of appellant or any vested right of appellant or of Mrs. Dobbins as will render it invalid or unconstitutional.

THE ALLEGATIONS IN APPELLANTS' BILL, AS TO THE *UNREASONABLENESS* OF THIS ORDINANCE ARE NOT SUFFICIENT TO JUSTIFY THIS COURT IN DECLARING THE ORDINANCE VOID ON THE GROUND THAT IT IS UNREASONABLE.

With reference to the appellant's contention that the said ordinance is invalid because unreasonable, we say that there are no facts before the court to successfully support such a contention, and cite the court to the following authorities with reference to the right of a court to declare a law invalid because unreasonable:

"Under a general grant of power over nuisances, "town authorities have no power to adopt an ordi- "nance declaring a thing a nuisance which in fact is "clearly not one, *but in doubtful cases depending upon "a variety of circumstances requiring judgment and "discretion their action is conclusive.*"

Harmon v. City of Lewiston, 46 Am. St. Rep. 893.

Barbier v. Connolly, 113 U. S. 27.

"The expediency or inexpediency of an act is a ques- "tion for the legislature and not for the court. When- "ever an act of the legislature can be so construed and "applied as to avoid a conflict with the Constitution

"and give it the force of law, such construction will be "adopted by the courts."

Slack *et al.*, v. Jacob *et al.*, 8 W. Va., 612.

"Courts have no right to set aside, to arrest or nul- "lify a law passed in relation to a subject within the "scope of the legislative authority on the ground that "it conflicts with their notions of natural rights, abso- "lute justice or sound morality."

Id., 638.

"The actions of the council were within their juris- "diction, and from their decision upon it there is no ap- "peal except to the public opinion of the new city. To "that tribunal, therefore, we remit all parties."

Waltman v. Philadelphia, 33 Pa. St., 212.

"For our purposes we must assume that if a state "of facts could exist that would justify such legisla- "tion it actually did exist when the statute now under "consideration was passed. For us the question is one "of power, not of expediency. If no state of circum- "stances could exist to justify such a statute, then we "may declare this one void because in excess of the "legislative power of the state, but if it could, we must "presume it did.

"Of the propriety of legislative interference within "the scope of the legislative power, the legislature is the "exclusive judge."

Munn v. Illinois, 94 U. S., 113, Book 28, L. Co- op., 77.

Peel Split Coal Co. v. West Va., 17 L. R. A., 389.

"When a town council is authorized by law to do "a particular act at its discretion, the courts will not "control this discretion and inquire into the propriety, "economy and general wisdom of the undertaking, or "into the details of the manner adopted to carry the "project into execution."

Darnelly v. Cabanns, 52 Ga. 212.

Wells v. Mayor, 43 Ga. 67.

"The conclusions of the learned trial judge was "made to depend almost wholly on the facts developed "by the evidence. If the jury had found the milk as "adulterated unwholesome, we have no doubt that the "trial judge would have sustained the convictions. "That the constitutionality of a statute ought not to "be made to depend on the finding of a jury on the "facts of a case is manifest. If the plain provisions of "the Constitution have been violated, or if the act can- "not be said to be a proper exercise of the police power, "in view of the *facts of which judicial notice may be "taken*, then the duty of declaring the act invalid is "clear. But in the absence of such finding the act "stands."

State v. Schlenker (Io.) 51 L. R. A. 351.

"But the defendant takes the broader ground that "the legislature cannot, under the Constitution, pro- "hibit the sale of milk from healthy cows which in the "natural state falls below the standard fixed by the act "unless such milk or the articles made from it are in "fact unwholesome or dangerous to public health. How "is that question of fact to be determined? The court "cannot take judicial notice whether the milk below "the standard is or is not unwholesome or dangerous to "public health. Is that to be a question for the jury? "If so, a court must charge a jury in each case if they "find milk below the standard to be unwholesome, then "the statute is constitutional; if they find it wholesome, "then the statute is unconstitutional. Evidently a con- "stitutional question cannot be settled, or rather un- "settled, in that way. The constitutionality would vary "with the varying judgment of juries. Either then the "legislature can, under the Constitution, forbid the sale "of milk below a certain standard, whether such milk "be in fact wholesome or not, *or else they cannot do this* "whether that milk be in fact wholesome or not. If "they may fix a standard, they must judge whether or "not milk below that standard is wholesome. The "courts cannot review that judgment."

People v. Cipperly (N. Y.) 4 N. E. 108.

In this case, if they can fix limits to keep gas houses out of any part of the city, they can fix these limits, and their judgment cannot be reviewed.

In the case of *In re* Wilshire, 103 Fed. Rep. 620, where the petitioner had been arrested and convicted for violating an ordinance of the City of Los Angeles, providing "That it shall be unlawful for any person, "firm or corporation *to erect, build, construct* or main- "tain in the City of Los Angeles any fence, building or "other structure of or to a greater length *than six feet "from the surface of a sidewalk, street or ground,* where "the same is erected or maintained, for the purpose of "painting thereon any sign or advertisement for adver- "tising purposes, or printing thereon or affixing or at- "taching thereto or thereon any bills or signs, placards, "cards, posters or other advertising matter for adver- "tising purposes," the constitutionality of said ordinance was attacked on the ground that it was unreasonable.

The judge, in his opinion, says:

"I entertain a good deal of doubt in respect to the "reasonableness of the maximum limitation placed upon "the structures in question by the municipal authorities "of the City of Los Angeles, but the fact that this doubt "exists is sufficient reason for the court to decline to "adjudge the ordinance invalid. It is only in clear "cases that such a judgment should be given."

"Statutes of 1891, Ch. 220, Sec. 1, prohibiting any "person from maintaining a stable for more than four "horses without a license from the board of health, is "a valid exercise of police powers of the common- "wealth and not of the right of eminent domain, and "such an exercise of police power is constitutional al- "though no provision is made for compensation to the "owner. It was said by Chief Justice Field in Lang-

"maid v. Reed, 159 Mass. 409, 34 N. E. 593, speaking "of the authority granted this court to issue an injunc- "tion to prevent the erection, occupancy or use of a "building or a stable for more than four horses: 'This "authority is independent of its powers as a court of "equity to restrain actual nuisances. A stable used for "more than four horses may or may not be a nuisance, "but whether it is or not, it is competent for the legis- "lature to say that it shall not be kept except in such "places as the mayor and aldermen of the city, or the "selectmen of town, may permit—and to confer upon "the court authority to enforce this prohibition by in- "junction, because stables in their nature, are often of- "fensive to the community, and the use of them may "be regulated by the legislature.' "

City of Newton v. Joyce, 166 Mass. 83; 44 N. E. 116.

With reference to the allegations in appellant's bill to the effect that the council of Los Angeles city, in the passage of said ordinance were actuated by bad and improper motives, the following authorities, we think, dispose of that contention effectually by holding that such matters as the bill sets up with reference thereto cannot be considered by the court.

"The rule is general with reference to the enact- "ment of all legislative bodies that the court cannot "inquire into the motives of the legislators in passing "them except as they may be disclosed on the face of "the acts or inferable from their operation considered "with reference to the condition of the country and ex- "isting legislation."

Hing v. Crowley, 113 U. S. 703.

Cooley on Constitutional Limitations, 5 Ed. 222, lays down the law to the same effect.

With reference to the contention made by appellant's counsel in their brief on file herein, to the effect

that the ordinance is invalid because it conflicts with Section 19, Art. XI., of the Constitution of the State of California, we confess that it is beyond our power to perceive where the conflict exists.

The said Section 19, Art XI., of the Constitution reads as follows:

"In any city where there are no public works owned "and controlled by the municipality for supplying the "same with water or artificial light, any individual, or "any company duly incorporated, for such purpose, un- "der and by authority of the laws of this state, shall, "under the direction of the superintendent of streets, "or other officer in control thereof, and under such gen- "eral regulations as the municipality may prescribe, for "damages and indemnity for damages, have the privi- "lege of using the public streets and thoroughfares "thereof, and of laying down pipes and conduits therein, "and connections therewith, so far as may be necessary "for introducing into and supplying such city and its "inhabitants either with gaslight, or other illuminating "light, or with fresh water for domestic and all other "purposes, upon the condition that the municipal gov- "ernment shall have the right to regulate the charges "thereof."

To us it is plain from the face of this section that it grants to private individuals and corporations the privilege only of using the streets and public thoroughfares of the city *for laying down pipes and conduits therein and connecting therewith* for the purpose of supplying gas or water.

Even such use of the public streets and thoroughfares must be made subject to such general rules as the city might prescribe.

There is nothing in this section of the Constitution which purports to or does deprive the city of the right

under its "police powers" to regulate the manufacture and storage of gas, or the city's right to restrict and confine the erection of gas works to certain definite districts of the city. The sole purpose of this section of the Constitution, as we view it, was to enable any individual or corporation who desired to furnish the city gas or water, under proper regulations, to use the public streets and thoroughfares for laying down pipe and conduits and making connections, without being compelled to obtain a franchise from the city to do so.

Is it possible that appellant thinks this section can be stretched to cover any more territory than *the public streets and thoroughfares of the city*, and that only for the purpose of laying pipe and conduits?

Appellant appears to think that because it has been granted a privilege, it has been given the city. We wonder that it did not claim the right to use the intersection of two streets for the purpose of erecting thereon these gas works and gas holder; and if the city had not recently acquired its own water works, we dare say appellant would be claiming the right, by virtue of said section, to convert one of the city parks into a reservoir. Appellant's contention, followed out, can but lead to this conclusion. We have been unable to find any judicial interpretation of this section of the Constitution giving it any broader effect than appears upon the face of it. We can not believe that the people, when they granted this right to the use of their public streets and thoroughfares, intended to deprive them-

selves of all right and power to regulate the erection and maintenance of gas works, and to be compelled to endure an intolerable nuisance where ever a soulless corporation might choose to erect and maintain it.

Respectfully sumbitted,

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